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ABSTRACT

Several presentations were made at the eighth meeting of the National Commission on New Technological Uses of Copyrighted Works (CONTU). The president of the Association for Computing Machinery addressed the issue of interactions of computer technology and economics, education, and society. A representative from the Center for Educational Media (NICEM) discussed the relation of the information storage and retrieval system of nonprint materials to the proposed copyright changes. Representatives from Documentation Associates Information Services, Inc. presented their views of copyright implications to the information brokerage business, especially the legality of their services and their accessibility to data bases. Representatives from Rand Corporation and Stanford Research Institute discussed respectively the technological advances of the computer, and implications and cases of computer abuses. Issues dealing with the copyrightability of computer programs, protecting investment in computer software, enforcement problems, fair use, and possible results of copyright legislation on users and producers were also covered in presentations and commission staff discusssions. (SC)

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

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VOLUME I

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

Law School Building, Room 2423, UCLA,
Los Angeles, California

Thursday, September 16, 1976
9:50 A.M.

COMMISSIONERS:

JUDGE STANLEY H. FULD, Chairman
MELVILLE NIMMER, Vice Chairman
RHODA H. KARPATKIN
HERSHEL SARBIN
E. GABRIEL PERLE
JOHN HERSEY
DAN LACY
ROBERT WEDGEWORTH
ALICE WILCOX
ARTHUR MILLER

ALSO PRESENT:

ARTHUR LEVINE
ROBERT FRASE
MICHAEL KEPLINGER
DOLORES DOUGHERTY
MARLENE MORRISEY

AGENDA

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12:00 Noon	Lunch	
1:50 P.M.	Dr. Herbert R. J. Grosch, President, Association for Computing Machinery	80
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Concluded at 5:25 P.M.

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LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 9:50 AM

JUDGE FULD: Let me call to order this meeting of CONTU -- its eighth -- in these pleasant surroundings and, in doing so, I express the Commission's deep appreciation to the UCLA Law School where our distinguished Vice-Chairman holds forth for his kindness in providing us with these facilities.

May I add these remarks for the record: We are here today and tomorrow to began an in-depth examination of the propriety of and necessity for copyright protection of data bases. As you know, in our previous meetings we have heard about the technological aspects of this topic but we shall now attempt to learn in greater detail the nature of the data base industry and the problems it faces. The purpose of this meeting is to address, among other things, the following questions:

1. What is a data base?
2. How are data bases created?
3. In what ways are various data bases similar to or different from one another?
4. How are they used?
5. When in computer-sensible media are they sufficiently tangible to amount to a writing?

The information explosion of the post-war era has led to many changes in the way in which research can be done. One of the most significant is the development of data bases which can be both stored in and searched by computers. It is now possible for one person, equipped with a telephone and a teletypewriter or cathode ray terminal, to have entire libraries literally at his fingertips. Even more important than the quantity of data available in this manner are the speed and flexibility with which it can be collected. One person with access to a computerized data base can now perform tasks with greater speed than could several persons working by traditional methods. Whether he is seeking legal precedents, economic statistics, or a bibliography dealing with a specific topic he can achieve in seconds what would otherwise take days.

Our guests are representatives of organizations which are deeply concerned with differing aspects of data bases. They include Dr. Herbert R. J. Grosch, who while speaking as an individual is President of the Association for Computing Machinery; Dr. M. Thomas Risner, Director of the National Information Center for Educational Media; Patricia Ferguson and Donna Chamberlain of Documentation Associates Information Services, Inc.; and Donn Parker of the Stanford Research Institute. Several other invitees who are unable to attend this meeting will soon be submitting their comments in writing. In addition, we shall hear about new works created by computers from Dr. Peter Weiner of the Rand Corporation. It is our hope that these sessions will enable the Commission to gain a fuller understanding of data bases and to make specific recommendations to Congress regarding this vitally important new technological medium. I would like to add that we plan further inquiry into the data base question at our November meeting.

May I now ask our director, Arthur Levine, to bring us up-to-date on the guidelines for the proviso contained in Section 108(g)(2).

MR. LEVINE: Thank you, Judge Fuld. I have a couple of announcements. One is, this room, tomorrow, is being taken up by a student group and our meeting will be next door.

MR. NIMMER: That is 2435, the next room over.

MR. LEVINE: Lunch for those who are fearful of never finding the Law School again if they wander too far off campus will be held at the Faculty Club and Mel has another announcement.

MR. NIMMER: After the meeting, I would like to invite all of the Commissioners and staff and spouses who would like to come over to my house, which is a couple of blocks away, for a little wine and cheese. I hope you can make it.

MR. LEVINE: Let me bring you up-to-date, first of all, on where the copyright revision Bill stands.

Yesterday the Rules Committee gave a rule, technically that is the language, to the Revision Bill in the House Rules Committee. The rule provides that there shall be one hour of debate on S22. Those who remember 1967 when the House went into session, I think at 10:00 in the morning and adjourned at 7:00 in the evening the first day and then went back for the second day the following week for almost the same amount of time, will realize the resolution of problems that has taken place since that time.

A half-hour will be devoted to Congressman Kastenmeier and the proponents of the Bill. A half-hour will be reserved for those who have opposing viewpoints.

If there are to be amendments to S22, they must be in the Congressional Record 72 hours before the Bill goes to the floor of the House. The Bill is scheduled to go to the floor of the House on Wednesday. So things are --

MR. LACY: Proponents of the amendment will have to get their amendments in the second half-hour?

MR. LEVINE: I assume out of the second half-hour, but, as I said, the amendment must be in the Congressional Record 72 hours prior.

MR. PERLE: Scheduled for on Wednesday?

MR. LEVINE: A week from yesterday.

MR. LACY: Which is the 22nd?

MR. LEVINE: The 22nd.

JUDGE FULD: Do you have any idea of the success or --

MR. LEVINE: I think there is no question at this point that if time permits that the Bill is going to pass.

MR. NIMMER: What is the prognosis on that?

MR. LEVINE: If we are talking about September 22nd, that leaves a good week and a half for the conferees to get together and agree or --

MR. NIMMER: Does it ever happen that the Houses both pass it but the Congress meeting does not meet in time?

MR. LEVINE: I am sure it has happened, but it seems very unlikely.

MR. PERLE: They are not planning on a conference at this time?

MR. LEVINE: The last word I got from Tom Brennan, who is the counsel for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, was that there would be a conference and a conference report.

MR. PERLE: When did they switch that around?

MR. LEVINE: That is what he told me on Tuesday.

MR. NIMMER: So that after there is a conference agreement it has to go back to each House to approve?

MR. FRASE: Yes.

MR. PERLE: It is a mere formality.

Do you have extra copies of the record?

MR. LEVINE: I think copies are being mailed.

MR. LACY: Did Tom give you any indication to what the position was, if the Senate conferees would accept the House Bill or would they be trying to get some compromise on changes?

MR. LEVINE: He did not.

MR. LACY: There was a good deal of talk that the conferees might not accept the House Bill.

MR. PERLE: Title 8 is under a lot of discussion and Tom --

MR. LEVINE: Title 8?

MR. PERLE: The Tribunal, Chapter 8. Did I say "Title"? I understand that the Senate is going to propose an entirely new Chapter 8. So that may bog it down.

MR. NIMMER: Do you know what the substance is?

MR. PERLE: Going back to what Brennan wrote in the first place.

I understand they want to go back to the Tribunal. The Senate does.

MR. WEDGEWORTH: There is likely to be controversy over NTIS's position that was inserted at the last minute, allowing them to copyright their products.

That gets us to 108(g)(2). Tom Brennan said that the last -- absolutely the last moment that he can get guidelines on 108(g)(2) would be September 27, which is a week from Monday. I think he said early in the morning. So time is running out on reaching an agreement on guidelines.

JUDGE FULD: And he insists on agreement between the groups?

MR. LEVINE: That is right. He also said that unless the major organizations agreed to the guidelines that, as far as he was concerned, the conference report would simply say "We urge the parties to get together and agree on how to operate under 108(g)(2)"; that they would not include in the report a recommendation from CONTU that had not been --

JUDGE FULD: Agreed upon?

MR. LEVINE: -- agreed upon by the parties. This does, I think, square also with what the House report says on 108(g)(2).

The National Commission on New Technological Uses of Copyrighted Works offered to provide their good offices in helping to develop these guidelines. This offer was accepted and also the final text of the guidelines has not been achieved. The Committee has reason to hope that within the next month some agreement can be reached on an initial set of guidelines covering practices under Section

108(g)(2).

JUDGE FULD: At the moment, that seems rather remote?

MR. PERLE: No.

MR. LEVINE: I think it seems very probable. I do not want to characterize it one way or another, but I do not think the parties are very far apart.

JUDGE FULD: They were when I left that conference.

MR. LEVINE: Well --

MR. NIMMER: There was more heat than substance.

MR. LEVINE: Let me then go back a little bit and bring everybody up to the point where we are today on the guidelines. At our April meeting we offered our good offices to the House to develop these guidelines. That was accepted by Congressman Kastenmeier on behalf of the subcommittee.

At our June meeting the Commission sat down and substantially agreed on what it considered to be fair guidelines on inter-library loan under Section 108(g)(2), the proviso to Section 108(g)(2).

A draft was then prepared primarily by Gabe Perle, circulated to the parties and the six major library associations agreed to the guidelines that CONTU had drafted with the proviso that no changes be made, no substantive changes be made in those guidelines, and with the suggestion that the guidelines be reviewed within five years.

The author-publisher groups had problems with some aspects of the guidelines. Primarily, three provisions: One, that under the draft guidelines articles in contributions published later than five years -- articles in periodicals published five years later than the time the request was made could be photocopied in unlimited quantity. That was one of their objections.

Second objection was that under the guidelines as drafted, if a library subscribed to a periodical -- and this is also true of books, but I will take periodicals as the shorthand because it is simpler -- if the library subscribed to a periodical, it could request in inter-library loan, as many photocopies as it wished.

The third was that the author-publisher groups believe that the guidelines should not apply to an agency or institution, public or private, which existed for the specific purpose of providing a central source for photocopies.

Then subsequent to that response, several Commissioners met in New York City. Among those present were Alice Wilcox, Bill Dix, Gabe Perle, Dan Lacy, and George Cary. The feeling from that meeting was that insofar as we were able to do it, we would attempt not to change the guidelines as originally drafted but come up with introductory language that might go toward solving some of the concerns of the authors and publishers. Gabe, Dan, and Bill Dix submitted their thoughts in draft language to us. We put them together and sent out what is in this document. The original introductory material that followed the July meeting is the material that is in there and that is lined out. The material here that is underlined was a subsequent draft by Gabe at the end of August. That draft that Gabe came up with at the end of August was given to the author-publisher groups and they made amendments to that draft and that is the written-in material that you see on the material that I handed out to you.

MR. WEDGEWORTH: The marginal notes?

MR. LEVINE: The marginal notes. And the --

JUDGE FULD: Deletions.

MR. PERLE: That does not include Charles's last letter, does it?

MR. LEVINE: No, it does not, except for the "not." There was a "not" included.

MR. PERLE: I drafted all three.

MR. LEVINE: New paragraph, new 3.

MR. HERSEY: In the guidelines themselves?

MR. PERLE: Page 2, "not" comes out. Paragraph 3.

MR. WEDGEWORTH: Paragraph --

MR. HERSEY: This "not" here.

MR. PERLE: It was revised from --

MS. WILCOX: Where are you?

MR. PERLE: When it was revised from "no" to "a."

MR. LEVINE: After we had offered our good offices to the House to come up with these guidelines, Senator McClellan wrote to Judge Fuld and a copy of that letter was distributed with the material before the June meeting asking that anything that is done by CONTU be reported not only to the House Subcommittee but to the Senate as well and asking us to also begin considerations of clearinghouse and licensing procedures for library photocopying, particularly in those libraries that were not covered by Section 108.

We are now at the point where this is what the publishers and authors believe are acceptable guidelines to them. They would eliminate most of the introductory material. They have suggested --

MR. LACY: That introductory material has never been formally submitted to be approved by the library groups, anyway.

MR. LEVINE: That is correct. It was sent to the CONTU members requesting comments. Mr. Hersey commented; Mr. Dix commented. I think they were the only written comments that we received.

If we can go to the guidelines, because I think that is the substance.

MR. WEDGEWORTH: I do have one question before you go there. On Page 4 of the introductory material it says that you are going to delete that paragraph, but substitute that 'guidelines will be needed for older material."

MR. HERSEY: That depends on what happens in the guidelines, so it probably does make sense to talk about that first. It has to do about this section on the five-year-old material.

MR. WEDGEWORTH: I see.

JUDGE FULD: The Bill would not include the introduction in any event to the guidelines.

MR. LEVINE: No, the Bill would not.

MR. LACY: The Bill does not include it.

MR. NIMMER: You mean the report?

JUDGE FULD: Would the report include that introduction?

MR. LACY: Well, the report would include whatever the Committee chose to say about it. This is really just suggestions to the language the Committee might use and, yes, I would think they might want to use introductory language.

JUDGE FULD: What I am getting at, does the introduction add anything or is it desirable to have an introduction?

MR. LEVINE: In some cases it does. There is some substance in the introductory material. The most substance is in the very last paragraph where it says, "These guidelines do not apply to organizations which exist for the specific purpose of providing a central source for photocopies." What is for short called the Boston Spa situation.

What resulted from the author-publisher objection to the June guidelines was the language after the semicolon in Paragraph 1(a) in the first page of the guidelines, which says essentially that any copies after five years shall not be included in such computation if the request is reasonable under the circumstances of the request. The author-publishers suggest that that simply say that "guidelines need to be developed for material after five years," rather than using the standard "reasonableness."

MR. NIMMER: Art, I think that was the extent of the author-publisher's suggestion, but what that in essence means -- and I do not know whether it should say it there -- is that the statutory standard of aggregate quantity, et cetera, would, of course, still be applicable, the Statute applies in any event. It is just what constitutes an aggregate number will not be covered by the guidelines now but may at some future time.

MR. LEVINE: If I may just add: Mel Nimmer and Judge Fuld, Gabe Perle, and I met last Wednesday with the author-publisher representatives, Charles Lieb, Irwin Karp, Bella Linden, and Alex Hoffman, who is chairman of their subcommittee, to hear what they had to say and to get their objections to the guidelines. This is essentially what they handed us at that point and what they gave us and, that precisely, they say whatever aggregate quantity is so as to substitute for a subscription to or purchase of such work should be the standard after five years.

As to the --

MR. NIMMER: Are you --

MR. HERSEY: Does it have to say anything there? Because some account has to be taken of this difficulty about the exemption of material more than five years old. If you say nothing, then the six or more copies would apply without limit in time, would it not?

MR. NIMMER: It might imply that there is, as far as the guidelines are concerned, there is no limit beyond the five-year period.

MR. WEDGEWORTH: Yes. But it is an assumption either way you go. If you say what you suggested to be said, then you are assuming that there is a problem where we do not really have any evidence that there is a problem. If you say what is presently there, you are assuming that the six limit would take into consideration whatever problems might develop, and they are objecting to this saying that it might not be appropriate.

MR. PERLE: If I may, what the author-publisher groups really want is for us to say, "With respect to material from periodicals more than five years old, these guidelines do not apply, there are no guidelines for that.

We leave it to the courts to decide whether or not the material is in that aggregate quantity."

MR. HERSEY: I might say that this is a fall-back position. What the authors and publishers really wanted was a further proviso that material more than five years old should have an additional limit of five more copies.

MR. LACY: Ten copies in all.

MR. HERSEY: Yes. And that this is an effort to fall back from that position to something that might be more acceptable.

MR. LACY: Actually, I wonder if the ten-copy limit would not be more acceptable.

MR. PERLE: That strikes me as so bizarre because Bella and Irwin both, after you left, Judge, took the position that five might be too much with respect to material more than five years old because, that is, the material which was requested might be more important, so that I think that the author-publishers idea would -- the feeling that I left with, was they would be happier if we simply said nothing.

MR. HERSEY: I am not so sure that is true, Gabe. I think the difficulty with the five-year limit is that very little journal copying more than five years old is done, relatively little. But the older material gets more of the general material that is copied and I think that was the concern.

JUDGE FULD: Alice, go ahead.

MS. WILCOX: Are you finished?

MR. HERSEY: Go ahead.

MS. WILCOX: We have talked about what they objected to. Could you tell me what they agreed to in the guidelines?

MR. PERLE: They agreed to take the guidelines really almost in their entirety except for those points that Arthur outlined.

JUDGE FULD: As to this paragraph.

MS. WILCOX: There is nothing in the guidelines except --

MR. LACY: Well, they agreed to the five years, which was really -- I mean, Bob's initial suggestion, the guidelines were built around that subject.

MS. WILCOX: Yes. But there are consistent holes. The concept of the five was based on the possibility of some proviso for the more than five years and --

MR. LACY: I should not be the spokesman for this position because I am not attempting to represent my position, just as I understand their position. What was a sense of uneasiness was what seemed to them to imply that there was absolutely no limit if it was over five years old. You could do a hundred or five hundred or whatever. They were willing at one time to accept a substantially higher limit and make it ten if it was over five years, or to say the guidelines just are not addressed to that, as they are not addressed to other things. And it would be left to the courts if it ever came up or subsequent negotiation, or either one of those two positions.

MR. NIMMER: May I have a point of information before we go on to the substance? Have there been any conversations by you, Art, or anyone from the Commission, with the library representatives, per se, since that discussion? Are you going to bring us up-to-date as to what their position is?

MR. LEVINE: Fine. You and I spoke to Bob Wedgeworth and just brought him up-to-date on what the author-publisher groups had said. I met on either Monday or Tuesday with John Lorenz, who is the Executive Director of the Association of Research Libraries, and Bill Dix, who asked me to express his regrets to you all for not being here today. I discussed the author-publisher objections and John Lorenz said with a couple of slight changes, which I will mention, which are not of any substance at all, I believe, he personally felt the changes were all right with him. He said that he was not speaking for either his association or any other association, but he felt that he did not find these objectionable.

MR. LACY: As I recall --

JUDGE FULD: Go right ahead.

MR. LACY: As I recall the discussion the last time, the reason that the five limit was applied only to the last five years was not from any -- as I understood it -- assumed at the time, or any belief on the part of the librarians that they needed a larger limit for a greater amount of copying over five years; but, on the contrary, that the copying for more than five years was so relatively small and so unlikely -- so remotely unlikely to be of sufficient quantity to justify not having a subscription, that it was not worth the paper work of over five years old. It was not that they felt a much bigger exemption.

MR. HERSEY: We do not have the data on that. The Boston Spa figures show that half of their copying is more than three years old.

JUDGE FULD: That was the point made at the meeting, that there was no support for the assumption.

MR. LACY: The assumption was not only that it was small. There are some other studies that have been done, the Fry study, and so on. They suggested that very shortly after five years, but that it would not be difficult to make the case that such copying that took place after five years was replacing a subscription.

JUDGE FULD: What would be the language in the second part of (a)? Or would there be no language? What is the suggestion that was ultimately made at that meeting?

MR. [illegible]: I do not know if there was any specific language suggested, but the idea was, as Art here has written, that that would be reserved for further future guidelines, but I am wondering whether --

MR. LEVINE: Excuse me. Just for clarification, these handwritten notes are not mine. These are Charles Lieb's and --

MR. NIMMER: That was not an attempt at specific language, as I take it.

MR. LEVINE: Right.

MR. NIMMER: Bob, do I understand your suggested reservation is that by referring to future guidelines that that makes it appear there is a problem where you really think there is not a problem?

MR. WEDGEWORTH: It seems to me that -- I was simply questioning what precisely CONTU should say with regard to that situation.

MR. NIMMER: Am I correct that isn't it the essence of what everybody is saying that nobody has a guideline for that earlier period but everybody also agrees that -- as they must by the law if the law passes -- that the statutory standard nevertheless applies to the aggregate number, so there just is not a guideline to interpret what that statutory standard means as to that earlier five-year period?

MR. WEDGEWORTH: There is mild disagreement as to whether there is a need for such a guideline.

MR. NIMMER: It is not relevant, really. What difference does it make whether people agree or disagree on a need? All we are really talking about is what do aggregate amounts mean and we are not going to try to say what it means in terms of numbers in that earlier than five-year period.

MR. WEDGEWORTH: What precisely would you be suggesting that CONTU put in that section of the guidelines?

JUDGE FULD: That is what I asked.

MR. LEVINE: If I may, originally, I have, in the first handed-out amended guidelines that we were given last Wednesday, the author-publishers had written in at the second to the last line that "if such request is permissible under the provisions of the copyright law."

JUDGE FULD: That does not mean very much.

MR. PERLE: It throws it back to the courts.

MR. LEVINE: This would come after "is." "Request is permissible," and the rest of that.

MR. WEDGEWORTH: This is in this paragraph that is --

MR. LEVINE: Paragraph A.

MR. NIMMER: Where would it start?

MR. LACY: As a matter of fact, the guidelines that were submitted in June, which the library groups agreed to, provide a guideline only for material less than five years old. All the authors and publishers are saying is that we should say it only applies to material five years old. They are not asking for any change. They are simply --

MR. WEDGEWORTH: That would be perfectly acceptable to me.

MR. LACY: I do not think it changes a thing. It just states what is the truth, that these do not provide anything for over five years old.

MR. HERSEY: What they want is language which does not leave the earlier material open to unlimited copying.

MR. LACY: There is not a statute -- the earlier language did not say anything about over five years old. All this would say is that it does not say anything about it.

MR. PERLE: Look at Page 3 of the guidelines themselves, (a)(1), which says, "excluding copies of articles made from any issues," and so on. That would be reworded to say that, "With respect to articles more than five years old, the copies shall not be in excess of those permitted by Section 108," period.

MR. LACY: We do not have any -- that is just stating the obvious. We have absolutely no authority to say --

MR. PERLE: What it says is these guidelines do not apply.

MR. MILLER: It is better said that way.

MR. WEDGEWORTH: That is what I am getting at. If we can state these guidelines --

MR. PERLE: Let us merely say that it does not apply. What are you saying about "certification"? Nothing?

JUDGE FULD: Does that go with the proviso section? Where would you have that?

MR. PERLE: That would go with Section --

JUDGE FULD: A?

MR. PERLE: No. (a)(1) on Page 3. The tail end of 3(a)(1).

MR. HERSEY: No. 4.

MR. LEVINE: The new No. 4.

MR. PERLE: New No. 4.

MR. MILLER: You have got an ambiguity still left. I am just asking the question. Are we saying that we are not speaking at all to the more than five-year situation? Or are we saying that the first sentence of A applies to the five-year situation, but we are not speaking beyond the first sentence in A? You get a different effect.

JUDGE FULD: I would think it --

MR. MILLER: Because you could end up with somebody saying that if the guidelines literally do not apply to the post five-year situation then this definition in A, sentence 1, does not apply to the post five-year situation.

MR. PERLE: We have to revise that to say, "periodicals published within the last five years."

MR. MILLER: Right.

MR. WEDGWORTH: In A, "With respect to any given periodicals published within" --

MR. PERLE: Right.

MR. MILLER: What would you say in your second sentence? "These guidelines do not address" --

MR. HERSEY: I think you would have to add something or refer to this later paragraph that Gabe just mentioned.

MR. MILLER: I think it has got to be fastened down.

MR. HERSEY: Yes, it has.

Gabe, would you get the language in the later section that you read before?

MR. PERLE: On Page 3?

MR. HERSEY: Yes. Starting with "excluding."

MR. PERLE: "Excluding"? This is the certification. Just simply say it is less than five years away, published within five years or less.

MR. HERSEY: Wait a minute now.

MR. LEVINE: May I make a suggestion? That rather than we being a group of drafters as a whole that we attempt to reach an agreement as to the substance of what we are trying to do and then we will try and sit down and draft --

MR. PERLE: Simply exclude everything over five years; right?

MR. WEDGEWORTH: Okay. Well, we will get to that.

MR. NIMMER: Exclude from the guidelines --

MR. PERLE: Periodicals.

MR. NIMMER: Obviously, we do not have the power to exclude from the Statute, but we do not want to be purporting to be doing that, either.

MR. PERLE: Simply say the guidelines do not apply. In that respect, I think we should make clear that through inadvertence these guidelines say something very peculiar, and God knows I did not intend them this way.

There is one standard for articles from periodicals and another for those materials that are not articles. Because the way the guidelines are phrased, it says, "copies of an article or articles." It does not say, "or other contribution to a periodical."

Now, that was an inadvertence. It is acceptable to the authors and publishers. I spoke to Bob about it and he was going to think about it.

If I may clear what I have done by accident?

MR. WEDGEWORTH: Don't we have to go to (b) first before it becomes entirely clear?

MR. LEVINE: Yes.

MR. PERLE: Well, it covers other things.

MS. WILCOX: It will cover editorials.

MR. PERLE: I do not know about an editorial. It would certainly cover a cartoon. It would cover some illustrative material.

MR. HERSEY: "And other material" takes care of that.

MR. MILLER: Ann Landers?

MR. PERLE: Well, I think the court would have to decide, certainly. I am not going to worry about that.

JUDGE FULD: Shouldn't we be more systematic with it and go to the first (1)(a)? What language should we put in, if any, instead of the provided portion?

MR. PERLE: If I may, Judge, I think that if we understand the principles, then some of us can sit down, some of us lawyers, and make another mistake, like I made before.

MR. HERSEY: You went too fast on that. I do not think the principle that you simply cut it off at five years is enough. I agree with Arthur. You have to pin down what you mean by that.

MR. PERLE: We mean -- and the suggestions with the author-publisher groups -- revolved clearly around articles and all material appearing in periodicals other than articles --

MR. HERSEY: I am sorry. I am going back to the five-year thing.

MR. LEVINE: The five years.

MR. HERSEY: On the five-year thing, you were just saying you would exclude everything more than five years old.

MR. PERLE: As to articles. These guidelines do not apply to articles published more than five years prior to the date when the request was made. I think further guidelines must be developed with respect to those or the courts will have to decide the application of 108(g)(2) to those.

MR. HERSEY: That is all right.

MR. PERLE: I think we can get that sort of language that will be okay. Is that okay with everybody?

MR. WEDGEWORTH: You mean you are saying we should state all of that?

MR. PERLE: Yes. Whether it be in the preamble or in the guidelines themselves, but it has to be made unequivocably clear that we are not condoning the reproduction of materials nor condemning it.

MR. WEDGEWORTH: It seems the simplest way of making that clear is to put a direct pointer back to the language itself, because the language itself is not ambiguous. It makes it clear that you cannot copy unlimited quantities and rather than going into all that, this is what I am saying. It can get too complicated. You need to say -- for example, the group you met with, technically is correct. These guidelines do not apply to 108(g)(2). They only apply to the proviso and in looking at it from that point of view, the guidelines should say that they do not apply to material older than five years, and that with respect to those materials you give a pointer back to the Statutes, which is the proviso -- I mean, the interpretation of the Statutes, which is the proviso itself.

MR. MILLER: I think there is consensus around the table that the methodology for articulating is left to a small committee on style.

MR. LACY: That is true.

MR. WEDGEWORTH: There is no disagreement on substance. It was just how you make it simple and clear.

MR. HERSEY: It falls short on our part because it simply says when we are drafting guidelines to interpret the aggregate quantity; that we are unable to draft the guidelines on this point. We should face that.

MR. MILLER: Yes. Without embarrassment.

MR. LEVINE: We could draft a guideline on that portion, but we cannot draft a guideline on which all parties will agree on this point.

MR. HERSEY: I think we could.

MR. LACY: Lieb's initial proposal was to put ten in for five years and I assume that would have been acceptable except for the paper work of recording, but the number, I think, would be acceptable.

MR. WEDGEWORTH: I do not think that would be acceptable, not because there is any implication that they are interested in going over ten, but that everybody would insist that we keep records for everything that we could possibly do and that is just driving us nuts.

MR. LACY: That is what I said. There would not be any objection to the number, per se, but the paper work.

MR. LEVINE: Let me just, for the record, state that John Lorenz's position was that it would be better if that language were rephrasing of the statutory language, not in such aggregate quantities. So that is consistent with what you are saying.

MR. PERLE: Let us do it.

MR. LEVINE: That gets us to (b) in the portion of material that kind of, I guess, fell between the cracks. There are articles and there are other materials and there are also contributions to collected works. It was contributions to collective works --

MR. NIMMER: That are not articles?

MR. LEVINE: Well --

MR. PERLE: Technically speaking, the language in (b) is okay because inasmuch as (a), as a matter of draftsmanship, specifies only articles, then everything else is in (b). It is okay with me to say "fiction, poetry, and other material." It just underscores.

MR. WEDGEWORTH: Except that in (d) it is a little confusing, Gabe, because in 108(d) it says, "contributions to a copyrighted collection or periodical issue."

MR. NIMMER: Where are you reading from?

JUDGE FULD: Statute.

MR. HERSEY: What we are doing is really to make the distinction between a case which is, for the most part, the problem. That is, the technical journal article and other material. We cannot get around the idea of articles excluding redefining what is technical and what is not technical, so it tries to make a distinction just simply between articles and other sources of materials.

MR. WEDGEWORTH: I understand that. What I am saying is I think that in the drafting that you are going to have to pay very close attention to the language which is used in 108(d) rather than simply say "any other material described in Section 108."

MR. PERLE: You can say "no more than one article," so when you say "other material," it is other contributions to copyrighted collections or any other contribution to a periodical issue. Technically, from an interpretive standpoint, it is okay.

MR. NIMMER: It makes it ambiguous, Gabe, if you insert this "fiction, poetry, and" because then "other material" could mean other than fiction and poetry, not other than articles.

MR. WEDGEWORTH: That was the point I was trying to get at. It really makes it much more ambiguous and it can cover the point that John is trying to make.

MR. PERLE: Subsequently, down on (b) on Page 3, it specifically says "any other material." I think it really should say "with respect to any other material."

MR. NIMMER: Without inserting "fiction, poetry." Do you agree, John?

MR. HERSEY: Well, so long as the interpretation is not put on this that fiction and poetry are considered articles. You see, that is the difficulty.

MR. LEVINE: Perhaps the introductory material can say that fiction and poetry are not considered articles.

MR. HERSEY: I am a little leery of that because I think the likelihood is that the report language will use guidelines and probably not use much of the --

MR. NIMMER: Another way it could be done is, "with respect to any other material (including fiction and poetry)."

MR. HERSEY: That would be all right.

MR. PERLE: "Including" without limitation.

MR. LACY: I think we should get an assurance from Brennan that if we told him the introduction was essentially the interpretation of the guidelines, there would be no problem.

MR. PERLE: I think it is easier to do it Mel's way: "Any other material including."

MR. WEDGEWORTH: I think that --

MR. HERSEY: I would go for that.

MR. PERLE: If we put right after 108 (d) "including poetry and fiction." Certainly anything we can do not to change it any more, we should do.

MR. LEVINE: Yes. "Including a collective work." Is that --

MR. PERLE: No. Just "including." It would go after --

MR. LEVINE: I am moving down, now. I am sorry. I am moving to the next --

MR. PERLE: Again, it is redundant. It is superfluous. But if they want it left in, it does not do any harm.

JUDGE FULD: "Any other material including fiction and poetry"?

MR. PERLE: I think that word "copyrighted" should stay in there. I really do. I do not think that ought to come out.

MR. NIMMER: What word are we talking about?

MR. PERLE: In 1(b) they want to strike the word "copyrighted," and I do not think they should.

MR. LEVINE: Doesn't the next clause "covered by Subsection 2 shall be protected by copyright"?

MR. PERLE: You are right.

MR. LEVINE: The next major change is new Paragraph 3, old Paragraph 2.

MR. PERLE: "Not" has to come out.

MR. LEVINE: This was a section included subsequent to our --

MR. HERSEY: Original guidelines.

MR. LEVINE: -- original guidelines.

MR. PERLE: It does not give any greater right.

MR. WEDGEWORTH: What does that mean?

MR. PERLE: What it says is it does not give you any greater right to photocopy by inter-library transactions than the right that you would have by intra-library --

from materials in any collection.

MR. NIMMER: It goes in a situation where you have a subscription and instead of reproducing from your own subscription copy you want to make inter-library loan, you cannot get more copies by way of an inter-library loan than if you just reproduced from your own subscription.

MR. PERLE: Or from a copy of a work, a book, that is in your collection. 108 describes in general what can be done and what cannot be done. There is no limitation.

MR. WEDGEWORTH: 108 does not tell what you can do within a given institution. That is the reason it is so crazy to me.

MR. LACY: There are some things you cannot do. Multiple copies, for example.

MR. PERLE: You cannot do multiple or systematic copying.

The whole proviso, 108(g)(2) says you can do systematic copying because your system is that there is an arrangement between one library and another to provide copies. That is really what the objective of that is.

MR. WEDGEWORTH: I did not have any objection. I just did not understand what it meant.

MR. LACY: My impression is that no such practice as this would be intended to object to what is carried on or contemplated but that they just wanted to make it clear that they were not intending, by saying that you could get an unlimited number of copies of material over five years old from another library; that you could do things like making multiple copies for a class that you could not do from your own subscription.

MS. WILCOX: I remember the reason for having something in about having a subscription was to take care of the societal problem of when items were lost, mutilated, or missing. Then I guess I would wonder why I could not address that question rather than spelling what it cannot do because I cannot -- maybe I do not know.

MR. LACY: I do not think it is trying to say what you cannot do. It is simply setting copying limits on 108. All other limits on their own copying still apply. One of the things we had in mind was: When you subscribe to the journal and you have all the copies from 1975 on but what about the copies on 1973 and 1974 issues before you entered the subscription? They have not prevented you from making a copy because you have subscribed, but I think it was just to make sure that that exemption did not justify, say, doing 30 copies for a class. I do not think it changes a thing, actually.

MS. WILCOX: That is exactly it. It is as though, when it makes -- I guess what I am uneasy on is that these guidelines were supposedly to recognize some kind of mutual trust and it is as though there is no trust whatsoever from --

MR. PERLE: Alice, I honestly -- I have got to say by preface to this that Dan Lacy and Gabriel Perle may be drummed out of the ranks of the publishing corps. The publisher representatives and the author representatives in particular, think that Lacy and Perle are not fully representing their interests.

MS. WILCOX: What I am responding to is I think that it is with great reluctance that the library community agreed to those guidelines, recognizing that there was tremendous compromise in there. And that --

MR. LACY: I think what you are doing is like a group of lawyers advising clients that if you read this literally, this would open up the possibility for that, so if there is no intention to take advantage of it, but it would help in closing the loophole.

MR. HERSEY: I think they recognize that you went out on a limb.

MR. LACY: I think that is genuinely recognized.

MR. HERSEY: In fact, this mark-up falls short of -- quite far short of what the AAP and the Authors League negotiated, would have wanted, acknowledging that you also went out on a limb.

MR. LEVINE: I guess --

MR. WEDGEWORTH: The part that bothers me is that I think I know the people well enough to know that they just do not sit around and dream up innocuous language. When I looked at this and it says "under other provisions of 108," what other provisions? What really are you talking about? Because I do not understand why you want to put it in if somebody cannot tell me specifically what it refers to.

MR. LACY: It refers to -- that is very clear. One is the multiple provision against multiple copying, classroom copying, 30 copies at a time.

The other one is the essential and National Institutes of Health problem when, by deliberate policy, a library subscribes to a one copy of a thing and tells all the employees of the organization involved, "Do not subscribe. Get photocopies here."

It is saying that if this Statute prohibits both of those from your own collection, the fact that these guidelines do not put any limit on copies you can get from another library provided you are subscribing to it, you cannot then go to another library and get 30 copies for a classroom under the exemption that you do not have to put -- if the guidelines do not put any limit because you already have a subscription, but there is the thing. I do not think the libraries intend to do that, but I do not see any harm in making it clear if it bothers people on the other side and reassures them.

MR. LEVINE: Gabe drafted that originally, I think --

MR. LACY: Those are the only two things. There is nothing secretive about that.

MR. MILLER: You know, you are not exempted by the First Amendment implications, the way it is drafted. It prohibits the request, which is speech. It does not prohibit the supplying.

MR. NIMMER: I think you have a --

MR. PERLE: It says "a library or archive may request a copy."

MR. NIMMER: "Only when," and so on.

MR. LACY: I am reading a different --

MR. PERLE: Will you look at new 3 on Page 2?

MR. LACY: I am sorry. I was looking at 4.

MR. NIMMER: Good point there, Arthur.

MR. HERSEY: Let me try again. What Dan tried on -- what I understand to be the point of this -- the guidelines set a limit of five copies for copying until you get a subscription. The guidelines do not set any limit if you have a subscription. This simply says the limit is what you would be permitted to do otherwise. You see? That is all. It is a kind of insurance.

MR. PERLE: Furthermore --

MS. WILCOX: Am I correct that these guidelines go back to 108(g)(2) and the proviso?

MR. HERSEY: Just the proviso.

MR. PERLE: That is all.

MS. WILCOX: Then they only --

MR. LACY: There is another effort, really, to say the same thing, that they are amending the rest of 108.

MS. WILCOX: Couldn't we say that they deal with inter-library arrangements, not intra-library arrangements?

MR. PERLE: All the way through it says "only." The guidelines say "restricted to inter-library loan."

MS. WILCOX: The fear we are talking about is the fear of intra-library --

MR. HERSEY: No, Alice. A limit of five copies is set until you get a subscription on inter-library loans.

MS. WILCOX: That I understand.

MR. HERSEY: Before this paragraph, there was no limit. There is an implicit limit because of law. This simply says explicitly that you cannot borrow more than you would be able to under --

MR. LEVINE: If you are on a subscription.

MS. WILCOX: The example it then gives deals with intra-library, not inter-library.

MR. NIMMER: That sets the --

MR. LACY: Suppose you have UCLA and USC -- the example is extreme but it is a precaution against -- USC and UCLA both have a subscription to a journal. A professor wants 50 copies of an article reproduced from one of those in the UCLA library to give to every member of his class. Clearly illegal. If he, however, gets smart and says "Get USC to duplicate 30 copies for us," it is not under the five-copy guidelines because you have got a subscription. There is no limit on the number I can get from another library, as long as I have got it. All it says is if it would be illegal to do it from your own copy, you cannot do it from another library.

I do not think anybody intends doing it, but I do not see that it prohibits any practice the library would feel proper.

MR. PERLE: It also does such things as allow a library loan transaction to get a whole work under 108 (e), reproduce a whole work for certain purposes. So it is not in either limitation nor expansion. It is just saying inter-library transactions do not expand the right.

MR. NIMMER: You cannot do more by way of inter-library than you could from intra-library.

MS. WILCOX: I guess my difficulty is I am not a lawyer.

MR. WEDGEWORTH: Let me give you an example that I think is somewhat related to not really understanding all of the implications of this.

The language of 108 says in effect that you cannot systematically reproduce materials under copyright, either multiple reproduction or reproductions over time to individuals. What I read here saying is that if you have a number of requests for inter-library arrangements where you may have a subscription, if you consider that, for example, it takes up to three months sometimes to replace a subscription or a lost issue, and, say, three or four people come in and they want a given item from a given volume of a journal, under this provision where it is intended to control something else, how do you relate these two? This section --

MR. LACY: Suppose you had not lost a copy; you had it right there. Would what you were doing be okay? It is certainly okay to get it from another library. No problem.

MR. LEVINE: May I make a suggestion?

MR. HERSEY: It just sets the same limits.

MR. LEVINE: It seems to me that making a separately numbered paragraph may be confusing. If, in fact, Paragraph 3 followed on from Paragraph 2 -- what it is intended to set a limitation on -- that it might be clearer that it does not apply to all of the other guidelines as well.

MR. WEDGEWORTH: I do not think that really makes that much difference.

MR. FRASE: 1(c)?

MR. PERLE: What? No. He is saying make it "provided" at the end of 2. Semicolon, "provided that a library may request a copy."

Is that what you mean?

MR. LEVINE: Yes, because standing out as a separate item, the --

JUDGE FULD: Implication.

MR. LEVINE: -- implication may be that it applies to all of the other numbered sections where it --

MR. PERLE: If it should be held the requesting entity cannot make copies from its own collection, but cannot do more than it can from its own collection. It is very logical.

MR. LEVINE: That it should follow after 2?

MR. PERLE: Very logical.

MR. HERSEY: Does that ease a little bit your concern about it? It is intended as a limitation on the single copy.

MR. WEDGEWORTH: I think that the Bill and the guidelines at present cover all those situations. I think it is unnecessary and that was my only point. The only way it would ease my concern about it would be to drop the whole thing, and there does not seem to be any support for that. But I still would like to go on record as saying it is not appropriate. I do think there are some potential conflicts with it.

MR. PERLE: I looked awful long and hard, and so did everybody else that I have spoken with, as to our conflicts and, Bob, I just did not find any. I really did not.

MR. NIMMER: Does it help any just to make clear what it is talking about to add at the very end of the sentence "to supply such copy from materials in its own collection rather than by intra-library arrangement"?

MR. HERSEY: No.

MR. PERLE: No.

MR. HERSEY: No. That just --

MR. LACY: Could you put it affirmatively, that if the library has a subscription, it can supply any copies by a library loan that it legally could from subscription?

MR. PERLE: Or if it has a work which is not available for copying.

MR. LACY: I mean, it is intended to be affirmative, not a negative. Even it is more than five. I mean, the five is no longer a limit. Once you subscribe you can do anything by an inter-library loan that you could have done if you had in-house a copy at hand. It is not really a limitation.

MR. MILLER: Psychologically, that is easier to accept.

MS. WILCOX: Yes, very much so.

MR. PERLE: If we can possibly avoid it, let us not go back to that group again, please.

(Laughter.)

MS. WILCOX: You are over the hump and we just got it started.

JUDGE FULD: Wouldn't a semicolon be all right after "collection provided however"? Wouldn't that be a clarification?

MR. PERLE: Why don't you offer to be their lawyer?

MR. MILLER: I have this feeling that I am in the Coliseum watching the Christians and the lions. I am not sure who I am rooting for.

(Laughter.)

MR. HERSEY: Watch out. Someday you may be eaten.

MR. PERLE: Someday you may be christened.

MR. LACY: The Christians have copyright of controversy, anyhow.

MR. NIMMER: Should we have a five-minute break?

JUDGE FULD: Yes.

You are still troubled that it says "provided however," at the end of "made such copy from its own collection; provided however the library may request"?

MR. WEDGEWORTH: I think that probably would be more acceptable to me than this, the way it is stated. But here again --

JUDGE FULD: You are afraid of something hidden?

MR. WEDGEWORTH: I am not so sure that I would put it that strongly. I just think that ambiguous language is always subject to things down the road that will come up and are not intended.

MR. LACY: I think that is exactly the problem and somebody may want to resolve the ambiguity.

MR. NIMMER: The problem of changing that language which has the same meaning when we are working under a combined, in order to get it to the Congress in time for it to have any meaning, any change of language, we then have to go back to the other group and we are going to run out of time.

MR. WEDGEWORTH: I do not know that we should spend that much more time on it.

MR. HERSEY: I would be willing to try the affirmative language on Irwin and Charles Lieb.

MR. WEDGEWORTH: It is stated affirmatively.

MR. HERSEY: It is stated negatively here.

MR. PERLE: No.

MR. WEDGEWORTH: No, it is not. It is stated affirmatively here.

JUDGE FULD: "Only" you mean is a negative?

MR. HERSEY: I think the notion of an affirmative is to be under any circumstances.

MR. PERLE: John, in all due respect, we have a limited time in which to get this and if we get back to Irwin and

Charles we are never, ever, ever going to get a guideline in. I think that is a practical answer.

MR. WEDGEWORTH: Let me just simplify. As I said before, that I simply wanted to go on record as saying that I think it is unnecessary. Obviously, more of you think that it is necessary, so let us go on to the next point.

MR. PERLE: Bob, if you want to, we will sit down later and see if we can dream up any situation where this would have some sort of limitation effect. That was not intended. I honestly could not find one and neither could anyone else, because what Dan and I were trying to go through is not change the substance of this, of what the consensus of the Commission was.

MR. LACY: The main effort was to make it clear to the author-publishers that this did not mean anything they feared it meant. I do not think it was any effort to change the substance of the articles.

MR. LEVINE: My concern is being able to say to the Commission, to the judge in a letter, to be able to say to Congress, "The parties agree," or "The parties do not agree."

MR. LACY: "The parties agree," is going to be their Constitutional process. If you wanted to say formally that "all of these associations agreed," you are talking about some time late in 1978. I think we would have to accept an unratified signature by emissaries rather than --

MR. WEDGEWORTH: I think we ought to go on to the next point, frankly.

MR. HERSEY: Is that attached to the previous paragraph now?

MR. PERLE: Yes.

JUDGE FULD: It will be 2, part of 2, with a semicolon or a period "provided however."

MR. PERLE: Do you want a "however" or just a "provided"?

JUDGE FULD: "Provided."

MR. PERLE: Semicolon "provided that."

MR. LEVINE: I will have to read it over.

MR. PERLE: I do not understand what he is talking about.

MR. WEDGEWORTH: In No. 4?

MR. PERLE: Yes. That marginal notation.

MR. WEDGEWORTH: Now, here, you get into the certification and I want to ask a question for information. It seems to me that in the transactions that take place under these provisions, the most that the actual certification would say is that "this certifies that this transaction is fully in accordance with the copyright law," or something, rather than going into this. But the guidelines provide the interpretation as to what the copyright law means with respect to those transactions. Am I correct in saying that?

MR. HERSEY: Yes. I think it would be sufficient that the people who sign this statement would have the definition, whatever it was, before them. Right?

MR. WEDGEWORTH: I think they are responsible for knowing what the definitions are, but it would simply say that "We certify that this transaction is fully in accordance with the" --

MR. PERLE: "The guidelines."

MR. WEDGEWORTH: -- "with the law."

MR. PERLE: It would have to say "the guidelines." The law is interpreted by the guidelines.

MS. WILCOX: Couldn't this be done in a symbolic way, in the sense, say, that on a request that came over a TWX that there could be a guideline X so that the certification is on the copying, that it is maintained in the requesting library?

MR. WEDGEWORTH: What we are saying is -- are you saying that every time you want a simple transaction that you are going to have to file a legal brief?

MR. PERLE: It is funny. This thing started without any certification and then we said here that there has to be some sort of certification, so the certification seeks to track the guidelines. Just thinking out loud, if the certification simply said that "This request is in accordance with the guidelines 108(g)(2)" why wouldn't that be enough?

MR. MILLER: It should be enough.

MR. WEDGEWORTH: That is what I am saying. I know it is a very fundamental kind of situation, but when we go out of this room and try to explain this to people, I think that is a very important point. What does this mean? Will they have to record all this information every time they do -- just simply certify this was done in accordance --

MR. PERLE: Certifying that the request is --

MR. LACY: I do not want to be a spokesman for the publishing industry, as I made clear, but I do not see any problem. This is not a policy. This is just a practical question.

What about TWX and telephone requests? What do you do if you get a telephone request for a photocopy, as a practical procedural matter? Do you say, "You have to send us an order," or --

MS. WILCOX: No. Absolutely not. That is the order. But I think what Bob is saying this really would require that there is a form that is filled out and if we can go back for a moment, the main reason for putting a certification in was to assign the responsibility to the requesting library, and not the filling library, the liability. Because that is --

MR. LACY: This was on the filling library, that the certification has been made, not that it was true or --

MS. WILCOX: If we got TWX requests it would be the end of it and we would not wait for an order or anything else, but it would be very possible on the requesting library that they keep that certification and symbol this with --

MR. FRASE: Certification.

MR. LACY: Other people are less concerned about keeping the record that you, as the filling library, do not fill it unless they do make the certification. We are willing to leave it.

MS. WILCOX: That is what I say about the symbol. It can simply say on the TWX, "The request is certified."

MR. WEDGEWORTH: We are not suggesting that this implies some change in the guidelines, but I think it is the kind of discussion that ought to be on record so that we understand what this means.

MR. LACY: I do not think there is --

MR. PERLE: How about a representation rather than a certification?

MR. HERSEY: What they want is the simplest possible procedure.

MR. PERLE: A certification means a certificate which has to be signed by the parties. If it is a representation, it can be oral.

MR. HERSEY: You say there is oral --

MR. WEDGEWORTH: That is when things go through the mail, John. But, you see, there are thousands of transactions done via lease telephone line and with no human intervention. These are just teletype machines talking to each other, or computers talking to each other. That kind of thing is money.

MR. LEVINE: What Dan has said so many times, certainly, I think, is applicable here. If people are requesting a seventh and eighth and ninth copy, no one in the world is going to know that they are requesting a seventh, eighth, and ninth copy, in violation of the guidelines. What the guidelines are attempting to do is merely set out a standard by which reasonable and honorable men will work.

MR. HERSEY: The one requirement would be that the person keeps a record.

MR. WEDGEWORTH: No question. That is the requirement.

MR. MILLER: It seems to me the word "represented" is better and, when it goes to a TWX, it is by symbol.

MR. WEDGEWORTH: The certification assumes a certain type of documentation where there may be many different types of documentation.

MS. WILCOX: That is why the original one suggested very much that the responsibility for keeping these records was at the requesting library.

MR. LACY: I do not think anybody wanted to make the supplier keep a record, just note that they did so and not that this was true, just that it was said.

MR. PERLE: Done.

MR. WEDGEWORTH: Okay.

JUDGE FULD: What is the change?

MR. PERLE: We will have to rewrite the certification provision to say that, "The requesting entity shall represent," or that, "You shall not fulfill unless the requesting entity represents that the request has been made in accordance with the guidelines of 108(g)(2)."

MR. HERSEY: That would obviate all the rest of this language.

MR. PERLE: Sure simplifies it. Makes more palatable to everybody.

MR. LEVINE: So we forget about 3?

MR. PERLE: The only question is do we phrase it affirmatively, that it "is in conformity with," or "does not violate"? I think "is in conformity with."

MR. WEDGEWORTH: "In conformity with."

MR. PERLE: Yes. It is nicer.

MR. LACY: That is the spirit of the thing. Let us do it this way.

MR. LEVINE: That takes out all of Pages --

MR. PERLE: It takes out all of 4, which now is 3.

MR. LACY: Doesn't the guidelines have to say what it is that they mean when they say it "is in conformity with"? You are not going to put all that in the certificate?

MR. HERSEY: The guidelines do say it elsewhere, don't they?

MR. LACY: Yes. I guess you are right.

MR. PERLE: Could simply say, "No request for a copy or phono record may be fulfilled unless such request includes a representation," or something of that nature. That the fulfillment --

MR. LACY: "Is in conformity with the guidelines."

MR. LEVINE: How far off are we in eliminating --

MR. PERLE: Let us play with it.

MR. WEDGEWORTH: Let us see what is actually necessary.

MR. PERLE: We have the drafting measure.

MR. LEVINE: Because among the things that appear in the certification, I think, that do not appear in the body of the guidelines, the early portions of the guidelines, is the question of the --

MR. PERLE: Availability?

MR. LEVINE: No. The entering an order. I think that only appears in the --

MR. PERLE: No, no. That is in the -- entering an order for a work? That is coming out.

MR. LEVINE: No. Entering an order for a subscription. I think that only appears in the --

MR. WEDGEWORTH: It is under 2, isn't it?

MR. HERSEY: No.

MR. LEVINE: It says, "shall have in force a subscription."

MR. PERLE: "Shall have in force or shall have" --

MR. LEVINE: "Entered."

MR. PERLE: "Or shall have entered an order for." Very good.

MR. HERSEY: Where is that now?

MR. WEDGEWORTH: It is under 2.

MR. LEVINE: On the very first page of the guidelines.

MR. WEDGEWORTH: "Enter an order for the purpose of such copyrighted collections" or "such copyrighted work"?

MR. PERLE: That has to come out because the publishers felt that it was meaningless; that there are a lot of circumstances where you cannot order. How do you order something that is out of print?

MR. WEDGEWORTH: But that is covered under another section.

MR. PERLE: Another section of the law.

JUDGE FULD: 108?

MR. PERLE: So you do not have to worry about it.

MR. WEDGEWORTH: I was looking for the language that you wanted.

MS. KARPATKIN: On Paragraph 2, there is a different time. There is a difference between having a subscription in force and entering an order. There is a lapse of anywhere from six to ten days.

MR. PERLE: I thought we were going to insert "shall have in force," comma "or shall have entered an order for," comma, "subscription for a periodical."

MR. HERSEY: That is at the bottom of Page 1?

MR. LEVINE: Yes. I think that is the only substantive point that appears in the certification that is not in the rest of the guidelines.

MR. LACY: That is a liberty and not a restriction.

MR. PERLE: Right.

JUDGE FULD: What does go out?

MR. PERLE: What does 5 mean? "A maker of a request orally"? You cannot comply with this, can you?

MS. WILCOX: I think, as I understand it, this would mean that even though a request was made orally to the filling library, the requesting library would have to have a copy.

MR. LACY: They would, in any event.

MS. WILCOX: I know they would.

MR. LACY: It just means they keep the copy of the record. They would have to keep it because they have to know that they ordered it in case a person calls up and says, "Where is my copy?"

MR. PERLE: This really is enormous progress.

MR. WEDGEWORTH: Is that all of the --

MR. PERLE: Changes? Yes.

MS. WILCOX: We have deleted all of Part 3. Before the newly numbered Part 5 --

MR. WEDGEWORTH: I'll accept the introductory material. Let us back up to be sure that we have --

We have revised Section 1;

Section 2 had the newly numbered Section 3 added to it;

we have eliminated all of Section 4, except for the preliminary statement with the change of representation as a substitute for certification;

and then Sections 5 and 6 remain as they are?

MR. LACY: As they have been from the beginning, actually.

MR. HERSEY: What about that Subsection 2 on Page 4? Is that some substance that makes a difference to leave out?

MR. PERLE: It is right in 2.

MR. HERSEY: 2?

MR. PERLE: "Materials not reasonably available."

MR. HERSEY: Oh, yes. Okay. That is right.

MR. LACY: I take it what we are reassuring the Committee is that the principal associations or representatives of the associations involved have agreed with that and are not necessarily going to say that every single library and every --

MR. NIMMER: Sure cannot say that.

MR. LEVINE: That is what Tom specifically said that he would want is -- well, he said the principal associations agree but obviously --

MR. LACY: I have in mind.

MR. PERLE: The preamble will still say that, "we believe this to say." I do not believe in our introductory language we should say --

MR. LACY: I think he said he would not put it in -- I do not think we can say all these associations have formally, as an association, voted. But we can say the representatives.

MR. PERLE: In our covering letter, but our introductory material cannot say that.

MR. LACY: I do not think the introductory material should say anything about it.

MR. WEDGEWORTH: How are you going to handle that, though?

MR. LEVINE: The introductory material or getting the agreement?

MR. WEDGEWORTH: Well, you discussed the guidelines with representatives of the publishers and authors on the 8th, but they, of course, have not seen the results of that discussion.

You have had some discussions with the representatives of the library community, but they, of course, have not seen the results of that.

I think rather than just state that, you have got to --

MR. LACY: We have to go back again.

MR. LEVINE: I was saving that for after we get where we go, for after we get through with the introductory material. But I do --

JUDGE FULD: Alice?

MS. WILCOX: A question, and that is: Were we really trying to define two things: one was, what aggregate quantities in lieu of subscription? That really is what we were trying to --

MR. PERLE: In lieu of subscription?

MS. WILCOX: Yes. In lieu of purchase or subscription. This Part 3 that was deleted, does that show up anyplace in the Roman numeral under Point 5 or has that been completely deleted?

MR. WEDGEWORTH: Under Point 5?

MS. WILCOX: Just above Point 5. There are three --

MR. WEDGEWORTH: That was under 2.

MS. WILCOX: That would come under 2?

MR. LEVINE: No.

MS. WILCOX: Where under 2?

MR. WEDGEWORTH: No. They wanted to delete that altogether.

MR. HERSEY: That is all eliminated now.

MS. WILCOX: Have we addressed the question at all of trying to cover -- it is not in there, but it would seem one of the good points, it did try to address the problem of suggesting that a substance should be placed --

MR. LEVINE: Alice, this is the book. This is not a subscription to a periodical. A subscription to a periodical presumably will be taken care of at the bottom of the first page of the guidelines, the first sentence in the old No. 2, and which will be the new No. 2, I guess: "In the event that a requesting entity shall have in force or shall have entered an order for a subscription to a periodical." The problem is the order for a book and that is what the publishers suggested be eliminated and that is, in fact, what the guidelines have eliminated.

MS. WILCOX: I just do not find it. If it is under 2, then that is fine.

(Discussion off the record.)

MR. PERLE: I think that you should check with Irwin and I think we ought to check with Dan and Charles and Bella.

MR. LACY: Bella. does not represent the Association.

MR. PERLE: Let Charles check with Bella.

MR. HERSEY: Actually, the section that we have eliminated simply repeats the earlier stuff, doesn't it?

MR. PERLE: It was intended to.

MR. HERSEY: Attaches everything to the certification and if we say, "In accordance with the guidelines," then all that is automatically attached.

MR. PERLE: I just want to make sure we all appreciate the elimination of that "placed an order for," is covered by (b). It says that whether or not you have it in your collection you can do up to five, through five. We have nothing that says anything about what happens if you do not have it in your collection. I do not think the elimination of that language that says you placed an order for makes any difference; right?

MR. LEVINE: I did not follow that, but I think it makes a substantive difference. I think that putting that language in -- under 1, you assume you do not have a subscription or you have not entered a subscription, under 1. On 2, it covers the situation where you have a subscription or you are entering a subscription. I think that covers all of the situations that we had contemplated.

Do I understand the point you were making?

MR. PERLE: No. I do not think that is what the guidelines say. I think what they have really properly renumbered is 1, but I will not argue with that. The first two paragraphs, (a) and (b), and the preliminary language is the overall rule and everything else are terms and conditions applicable to the overall rule. The overall rule is that you can do five articles from a periodical in any given year, if the periodical is published within five years prior to making a request.

(b) says that for everything else you can have five articles a year, if it is protected by copyright.

All the other provisions are limitations on that.

MR. LEVINE: No. Some expansions.

MR. PERLE: Or expansions.

MR. LACY: The whole point of this is what keeps you from subscribing and once you have subscribed, obviously the copying does not keep you from subscription, so that exempts you from the fact.

MR. PERLE: I do not think the elimination of that "placing an order" makes any substantive difference.

MS. WILCOX: It does. It makes a very big one. It is what defines in lieu of subscription and it simply is saying is that --

MR. PERLE: It is purchase. We have eliminated --

MS. WILCOX: What do you do with the period between putting the subscription in now and --

MR. PERLE: The subscription is still there. The elimination of that Roman numeral III applies only to the entering of an order for something other than a periodical.

MR. LEVINE: I think everybody is in agreement that that is out, though, Gabe.

MR. PERLE: I want to make sure that there is not a hooker; that we are not putting a zinger into the library group this way.

MR. NIMMER: I do not understand what your concern is.

MR. PERLE: I just want to make sure that Bob and Alice are in the position where some day they or the ALA is going to say to them, "Look what you did to us." I do not think we did anything. I am just thinking out loud.

MR. LACY: As a practical matter, nothing is a technical matter, I think the point would be if you decided, okay, there are enough orders for photocopies in this particular compendium, not a journal, so we ought to buy it; you go ahead and put your purchase order in and then from then on you could get anything from another library, whether more than five or not, that you could if the book had already arrived and was on your shelf.

MR. HERSEY: "Not reasonably available," takes care of it. It really does.

MR. PERLE: Yes, it does.

MR. WEDGEWORTH: As a matter of fact, I think we had done that with other sections. When in doubt, leave it out.

MR. PERLE: That is a good paraphrase.

(Laughter.)

MR. LACY: Would you carry that to a logical conclusion?

MR. WEDGEWORTH: I would not object to that, either.

MR. PERLE: You are too silent, Hershel.

MR. SARBIN: No. I have not been. I have been just silent enough.

(Laughter.)

JUDGE FULD: What else is there?

MR. LEVINE: There is the introductory material.

Again, I am thinking out loud and I have not thought it through, but are we in any way getting confused again between article and other material as to "shall have entered an order for"? I am just not sure and I want to be sure that we have it.

MR. HERSEY: Where is that?

MR. LEVINE: In 2.

MR. HERSEY: You are in the guidelines still?

MR. LEVINE: Yes. "In the event that a requesting entity shall have in force or shall have entered an order for a subscription to a periodical or has within its collection a copy or phonorecord of any other copyrighted work," are we getting again into the problem of collective works? Is that again something between --

MR. NIMMER: I do not think that is a problem for anybody.

MR. PERLE: It is okay. I think it is okay.

MR. LEVINE: It is all right with me.

Getting to the introductory material, the publishers essentially, I think, originally told me that they wanted to eliminate everything but the first two paragraphs and the last paragraph as amended. Their latest markup comes in with some other paragraphs in, which means that they will be willing to include those.

MR. WEDGEWORTH: On Page 3, are we leaving in the final paragraph which begins, "These guidelines"?

MR. HERSEY: Yes. I think that is in.

MR. LEVINE: Well, they seem to indicate that that would be acceptable to them with the --

JUDGE FULD: Changes.

MR. LEVINE: -- changes, which do not seem particularly significant.

MR. PERLE: But inserting "inter-library" is terribly important there.

MR. LEVINE: No. I am talking about their changes as opposed to your changes.

MR. HERSEY: Top of Page 4.

MR. WEDGEWORTH: Well, the reason that I ask that is that at the top of Page 4, that is not entirely precise, because the guidelines cover more than just that.

MR. FRASE: If you left the original word in "intended only," but "primarily" I think it would be more accurate.

MR. WEDGEWORTH: It is certainly more accurate to say "primarily" rather than "only," because "only" is incorrect.

MR. LEVINE: Yes. That is your change.

MR. PERLE: What would happen if we struck both of them? "Intended to provide guidance in the application."

MR. LEVINE: Then I think that, again, means "only." No, it does not.

MR. PERLE: I think "primarily" is a better word.

MR. WEDGEWORTH: I think that might do it.

MR. PERLE: Actually, these guidelines are intended to provide guidance in the most frequently encountered inter-library case.

MR. LEVINE: So you could not leave out "primarily."

MR. PERLE: The concern is that they be restricted to inter-library, not intra-library.

MR. LACY: I think the reason for that is most of them are over five years. If they wanted the "only" in to make sure it would comply with that over five years. I wrote the "primarily," actually, and my impression was that -- I was not at that meeting.

MR. PERLE: How do you feel about saying "these guidelines are intended to provide guidance"?

MR. LACY: It is all right with me.

MR. HERSEY: Among other things.

MR. SARBIN: That is a good idea.

MR. PERLE: I think I know what you are saying, Hershel. You are saying we are talking too much.

MR. SARBIN: No. But that is a good idea.

MR. MILLER: You have to eliminate the reference to "certificate" on Page 4.

MR. PERLE: And a representation.

JUDGE FULD: We leave out specific form.

MR. LEVINE: Yes.

MR. LACY: Yes. In fact, I think it would be simpler to cut out everything from "year" on because it would involve a lot of rewrite and we do not really have to -- the certificate and all is just a means of implementing follow-up. Refer to it in the introduction.

MR. PERLE: You have to leave in from "periodical issue less than five years old."

MR. LACY: "From any given periodical in any calendar year." Then I would -- we already have the five. It is already referred to. We are saying two things: one, you cannot do it more than these five copies if they are fewer than five years; and we require you to make a certificate about the things over five years, which we just cut out the reference to the certificate.

MR. WEDGEWORTH: Just put a period after "calendar year"?

MR. LACY: Yes.

MR. LEVINE: That takes us to Page 5 and the first full paragraph there.

MR. HERSEY: Wait a minute. I am sorry. Leave out the whole --

MR. NIMMER: Yes. Period after "any calendar year."

MR. LACY: It does not change the requirement. It just does not bother to say in the introduction because it would be too complicated to explain it twice.

I really wonder whether you need that first paragraph on 5 now that we have made the guidelines more explicit. I mean, the whole point of all this elaborate introduction was to try to, without changing the guidelines, to reassure authors and publishers who might have been concerned that the guidelines would not do the things that it does not do. They have preferred to get that reassurance by stating the guidelines, but the guidelines do not say things that they do not say and it is so there is no particular point in saying once more in the guidelines that it does not say something it does not say.

MR. WEDGEWORTH: I would say we ought to X that paragraph and just go to the final paragraph.

MR. LEVINE: Why not the first two paragraphs and the final paragraph, which is what they had originally suggested at the meeting a week ago?

MR. PERLE: We are deleting the last part of it?

MR. WEDGEWORTH: No. You need that section on Page 3. The paragraph on Page 3: "These guidelines are intended to provide guidance in the application of 108."

MR. MILLER: There are a total of four paragraphs.

MR. WEDGEWORTH: Yes.

MR. LEVINE: Okay.

MR. PERLE: Why did they strike the last part of -- this is new. We did not discuss this, Dan, the last part of the paragraph on 6.

MS. WILCOX: Good question.

MR. LACY: I have no idea. They struck a lot of stuff that I drafted for their benefit. But strike it; it is all right with me.

I think probably I do know. It refers to a new situation and they wanted to cut up the words "in the future" and "otherwise," and I think that is because of the belief among some people that there now exists institutions that make that --

MR. WEDGEWORTH: The intent is adequately covered in Section 108(i), with that new Section 108(i). It clearly covers that.

MR. LEVINE: Ends the last sentence in the guidelines, and it also calls for a review and I think that --

MR. WEDGEWORTH: Yes.

JUDGE FULD: That would seem to conclude it, wouldn't it?

MR. LEVINE: Well, it concludes, I think, the discussion of the draft. Now the question is how we get the agreement of the affected parties?

MR. PERLE: First, I think we ought to have a clean copy and I think that that should not be hard to do.

MR. LEVINE: You and I can sit down and do it.

MR. PERLE: And get it typed up.

MR. HERSEY: Could it indicate changes?

MR. PERLE: Yes.

MR. SARBIN: You do have facilities to get it typed?

MR. NIMMER: I hope. I will try.

MR. LEVINE: Dee Dee is here and she can type it if we have a typewriter she can use.

MR. PERLE: The minute the testimony starts, you want to disappear? Then I think that Bob and Alice -- and I do not know who you want to check.

MR. LEVINE: Can we do it the way we did it after the last guidelines and, that is, that would Bob and Alice be willing to contact the major library associations?

MR. HERSEY: I can do it right from here.

MR. WEDGEWORTH: I think Alice can do that since she is a member of the subcommittee that worked with the guidelines and she has contacted the people before that. I say that specifically because I want to try to really separate roles here between functioning as a member of the Commission and where we do other things.

MR. FRASE: You might want to use TWX in some cases or our facilities in the University. If there are facilities on the other end that some recipient --

MS. WILCOX: I am trying to think of the major associations. They may not have TWX, but we probably could send a Mail-O-Gram or something like that, send a copy because it certainly will be easier for them to have a copy rather than just to explain it over the telephone.

MR. LACY: I think probably it needs some explanation over the telephone after they have seen the copy.

MS. WILCOX: Quite a bit.

MR. WEDGEWORTH: Does this mean that following a review of the clean copy that the Commission will approve for transmittal subject to ratification guidelines for the proviso to 108(g)(2)?

MR. LEVINE: Certainly.

MR. WEDGEWORTH: It seems to me that the Commission should not be sitting around waiting to see what one or the other parties is doing. We have given it our best consideration and we have come up with something and we go say, "Here it is."

MR. LEVINE: Yes.

MR. NIMMER: That is an important point, notwithstanding what Tom Brennan said about they do not want it unless they have the approval of all the parties. That eventually may or may not be the case. We should go on record as approving it.

MR. LEVINE: He said he would not put it in.

MR. LACY: That is a responsibility quite apart from the offer as accepted by Kastenmeier, but you can offer to make such recommendation to Congress as we feel appropriate.

MR. HERSEY: I think Brennan will want to avoid a situation where a lot of time is taken reopening this thing and arguing it in the conference committee because they want to get it done as quickly as possible.

MR. WEDGEWORTH: That is true. I am trying to address the same point in a different perspective: that we should not go back to the parties with the understanding that this is open for renegotiation. They get a binary choice; it is either "yes" or "no."

MR. LEVINE: I really, in that regard, then, urge upon those of you who are going to be contacting the parties that this is really attempted to bring together conflicting points of view and that these are --

MR. PERLE: Not conflicting points of view.

MR. LACY: Actually, I think phrasing, there is almost total substance.

MR. LEVINE: Conflicting is the wrong word.

MR. SARBIN: That is the wrong word. It might be worthwhile for you to write out what you consider to be a statement of -- just a paragraph of what we have tried to do and this is our conclusion and that this is really the best we can do and we are in a position in which there cannot really be further discussion on it. That is all. Just a general statement that says, "Recognize where we are." I think that that is certainly appropriate and consistent with what you were saying before.

MR. LACY: I would think neither one of the sides will want to be in the position to say that CONTU is saying, "Here are the guidelines based on this long discussion which has been approved by side A and not by side B."

MR. SARBIN: I think it is important to put something down in a paragraph because I feel concerned that parties involved here may say if we do not put something in writing to this effect this was told to us as "take it or leave it." That it might be like a threat rather than what it is intended to be. That should not be hard. You are good at that.

MR. LEVINE: Maybe the thing that we can say in effect is we have been working on these -- the Commission met these two days and there is not going to be another opportunity for the Commission to meet and this is --

MR. LACY: And we believe this covers the principal concerns that everyone has expressed.

MR. HERSEY: I do not think there would be any problem.

MR. LACY: I do not anticipate any problem from AAP.

MR. WEDGEWORTH: The point is, these groups are sophisticated enough if they have substantial objection they can always go directly to Congress and they do not have to negotiate with them through the Commission. My intent was we think about it and I think the written statement is important so that all of the people who are representing what has occurred here say exactly the same thing so that there are not different stories coming from different groups and that they understand that we have reached the end of the editorial changes that really do not change the substantive part of the guidelines.

JUDGE FULD: Arthur?

MR. MILLER: I am just reacting to something Dan had said. In submitting this to Brennan -- I am speaking only for myself, maybe for Rhoda -- I personally do not want this thing submitted as the view of the Commission, as to what the Commission believes the guidelines should be. At most, all this is is the Commission discharging its obligation to use its good offices in conjunction with representatives of the relevant groups.

I did not participate in those discussions and I have in no way developed my own thoughts as to what the Commission qua Commission should come up with independent of those groups.

MR. NIMMER: May I speak to that -- or maybe Rhoda wants to speak to it.

MS. KARPATKIN: Go ahead.

MR. NIMMER: Obviously we should distinguish between what we eventually are going to recommend in the photocopying area and what has been done here. What we eventually recommend may or may not be an interpretation of the existing or the proposed law or it may go beyond the proposed law. All this purports to do is to interpret what the proposed law says, not whether or not

the proposed law is what we think is the most ideal set of circumstances. But within accepting the standards of 108(g), then looking to this only as an interpretation of that, I understand further what you are saying, Arthur.

But I would hope that the Commission could say, "This is, in our view, a good interpretation of 108(g)(2)" or "108(g)(2) proviso." I would hope we could do that simply because I think that will help in effectuating its embodiment in the report, particularly if there is some difficulty with the principal parties or any of them on accepting this.

MR. WEDGEWORTH: I think that it does say what you have just said. Do you not think that that paragraph says what you intended? It is not that it is just the Commission.

MR. MILLER: It says, "The Commission considers the guidelines which follow to be correct." That is Mel's point. Mel wants me to say, "I think these guidelines are correct." To date, all I know is that the only thing that is correct is that these guidelines, as this draft, represents a major collaborative effort.

MR. LACY: You have to miss the meaning of the formal Commission and quickly call a meeting of such Commissioners as those could attend and did develop this. It was not just the two parties. I think the Commission was present. Whether the librarians did not make a good --

MR. PERLE: We can all make it the Commission with one Commissioner abstaining.

MR. WEDGEWORTH: I do not agree with that, Arthur, because it is not placed in proper context, if you stop with saying that it is correct. Because what it says is that the Commission considers the guidelines which follow to be a correct, workable, and fair interpretation of the intent of the proviso portion of 108(g)(2). I think if you leave out the rest of it, it is not -- it says more.

JUDGE FULD: Yes, Rhoda?

MS. KARPATKIN: Whether the Commission is structured, that sentence is silent as to whether the Commission believes it is in the public interest. What has happened here is that an attempt has been made to work out a compromise between parties with different views and that is all that was undertaken and that still leaves open whether the resolution of the different views and the ways it was resolved --

MR. SARBIN: There is a view at this time that any compromise would be in the public interest.

MS. KARPATKIN: It might be in the interest of the report to be next --

MR. LACY: I do not think the Commissioners -- at least this Commissioner -- that, granted, 108(g)(2), the question is not how you handle library photocopying but how you interpret 108(g)(2), that this was the best possible interpretation in the public interest that could be arrived at. I think we were genuinely looking at the public interest. There is no particular interest in libraries different than that and there is no particular interest in publishers terribly different than that. What we really were looking at is what realistic stuff is available without imperiling the continued existence and financial liability to be determined. There was genuine public interest criterion in all of our minds.

MR. SARBIN: I have a general comment to make. It is in the public interest that this Commission accept this in order to get on with its work.

(Laughter.)

MS. KARPATKIN: That is what I just said.

MR. SARBIN: This is the real public interest.

MS. KARPATKIN: I agree. The question is --

MR. LACY: Certainly my vote was what I thought was in the interest of the public associations.

MS. KARPATKIN: But the question remains now, after all of the times I have asked for staff assistance in identifying the public interest, that has not happened. I do not know how I could cast a vote one way or the other. I do not think it much matters. I think it was Commission resolution on this. One or a couple of abstentions would not make much difference, but I do not know that I would be fulfilling my responsibility by endorsing a compromise between two interested parties, even though it would seem to me as an order that it was a workable compromise, which it certainly seems to be. But there is more involved than casting a vote.

JUDGE FULD: We are using our best interests to get together.

MR. PERLE: If I may, Dan and I -- and I think Bob and Alice, in their way -- let me put it another way. In one way or another they have made representations as to what they consider to be our constituency: That we have been appointed from among them but we do not represent them. We represent what we think is in the public interest; taking into consideration all of the factors. So that when I vote, I am not voting solely on behalf of the group from which I was appointed. I think that is true of every single one of us here and it is one of the distinguishing factors of this Commission, in that it has developed a unity, a feeling of purpose so that --

JUDGE FULD: And an objectivity.

MR. PERLE: Subject of objectivity.

So that speaking for myself, I do not feel that I have to have assurances that this is best for the public in order to vote in the public interest.

MR. LACY: I do not think we have anything really to vote on, to tell you the truth, until we get the clean copy. So why don't we approve this draft of the guidelines --

MR. WEDGEWORTH: Let us vote to adjourn for lunch.

MR. LEVINE: I just hearken us back to our resolution, original resolution, which was for CONTU to use the good offices to bring the parties together. Just one quick thing, again, procedural question. We have left open Saturday morning for general Commissioner discussion if, in fact, there is a feeling that there is a need for such discussion. I know several of the Commissioners are not going to be here Saturday morning and I wonder whether there is a feeling as to whether we cannot decide now as to whether we want to continue Saturday morning.

MR. HERSEY: Before we decide that, did I understand you to say that Mr. Parker is not coming tomorrow afternoon?

MR. LEVINE: No. Mr. Parker is coming. We have a revised agenda. Because Quadra is not coming in the morning, Peter Weiner will be moved to the morning. Donn Parker will be at 2:00 o'clock tomorrow afternoon.

MR. HERSEY: Could we set the hour from 3:00 to 4:00 to resolve this issue so far as possible, and that will assume that I have checked with Karp and you with Lieb before --

JUDGE FULD: 3:00 to 4:00 when?

MR. HERSEY: Tomorrow afternoon, so that we could get this thing --

MR. LEVINE: Fine.

MR. LACY: I assume most people do not plan to leave until Saturday morning. I would feel we would have some time Friday evening. I made a midday plane reservation just in case we needed it, but I would welcome being able to take a, say, 9:00 o'clock.

JUDGE FULD: Friday evening would be a little difficult for me. I understand we were not to meet Friday evening, but Saturday morning.

You will not be here Saturday?

MR. LEVINE: If necessary.

MR. LACY: No. I will be here Saturday as presently planned. If we could note that we were not going to meet, I would take a 9:00 o'clock or whatever flight.

MR. LEVINE: I think Mrs. Karpatkin is not going to be able to be here; Mr. Hersey is not going to be able to be here; I think Hershel Sarbin will not be here.

MR. WEDGEWORTH: What is the purpose of Saturday morning?

MR. LEVINE: In case there are matters -- at the last Commission meeting it was suggested that the Commissioners would gain some benefit from sitting and discussing the issues and that there be time left available for general discussion of issues. That is why that time is --

MR. LACY: I think if we go from 3:00 o'clock, that should be all right.

JUDGE FULD: I would think so.

MR. WEDGEWORTH: I thought that was the intent at the last meeting, that we do provide discussion time.

MR. LEVINE: Yes. We did do that, also, but just in case, we left Saturday morning open, also.

MR. NIMMER: Starting at 3:00 should be ample.

MR. LEVINE: Fine.

MR. NIMMER: All right. Adjourn?

JUDGE FULD: Nothing else, is there? We will return, then, at 1:30.

(Lunch recess.)

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LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 1:50 PM

JUDGE FULD: Our first speaker is Dr. Herbert R. J. Grosch. He has an extensive background in computer technology. His work experience has been managing computer and space projects for General Electric and IBM as well as serving European consultants for such firms as Remington Rand, Univac, and Control Data.

Dr. Grosch worked with the United States Department of Commerce for six years with responsibilty for establishing automatic data processing standards for both the Federal government and then offering the United States' point of view in an effort to establish national and international ADP standards.

Currently, Dr. Grosch is a consulting editor for Computer World and President of the Association for Computing Machinery.

My fellow Commissioners and I are delighted that such an eminent guest is appearing before us.

DR. GROSCH: Thank you very much. That is kind of you.

I must say I was very much impressed in turn to see the research plan that I got in the mail and to see how thoroughly you had already begun to go into the problems that the technology poses and its interactions with the public domain, as well as the ordinary legislative, legal, and economic matters.

In the little thing I handed out to you, I stated my interests modeled in some way after the way the British directors are supposed to say that they really have part ownership of the real estate outfit and the Board of Directors of this other company is voting on today.

I do have to tell you that I am very much concerned that your recommendations reflect an acceptance of continuing rapid technological change in this field and the fields adjacent to it. One of the things I want to say today: I do not see any prospect whatsoever for this change slowing up. We are not running out of new physical phenomena; there are handbooks after handbooks of new materials, new physical phenomena, newly discovered nuclear particles, and what have you, all of which I am sure somebody will turn into business machines. For that reason, anything which, no matter how cleverly you bring it up to current speed, anything which is then fixed, I think is doomed to becoming obsolete within just literally a fraction of a decade.

A generation of computer time, historically since the introduction of electronics, has only been six years. That is, in six years a completely new family of machines, usually built out of completely new components, is announced; initial installations are made; the programs are written for it. They do not work very well, but, then, we have learned to live with that. The machines come widely spread and a successor system is announced. All in six years.

There is some indication that as patterns of use change and as the investment in the software and in the big data banks increases that that cycle may lengthen; that it may take seven or eight years for a generation to evolve in the near future and, possibly, ten years, twenty years from now. But it certainly is not going to cease to evolve and many of the things that are a direct concern to you -- for instance, the representation of data within the machine, the ways in which it would be presented to the outside world, either in hard copy form or in some novel form, which, nevertheless, contains the same information -- these things are all going to continue to change rapidly.

The important thing, probably, is the interaction of that technology and the economics. Specifically, for instance, if you look at the research plan, one of the items that is mentioned is memory technology. That is Item 3B on the technological page. We see very clearly in the sense that it is virtually guaranteed, both by the remarks of the manufacturers and by the publication of advanced research in the technological journals, that the cost of storing one piece of information will drop by a factor of between ten and a hundred in the next decade. I would guess the hundred myself, rather than the ten. Moreover, the cost of processing data will continue to drop as the speeds of the machines increase; so that it is not just a question of being able to hold it incommunicado, as it were. You will not only be able to do that very much more cheaply but you will be able to work it over, to transform it from one fashion to another, to interact with other data banks, to introduce more complicated programs at a cheaper and cheaper cost.

Now, before we met this afternoon, I was remarking to a couple of old friends that this does not mean that you can do anything for nothing because we have one limiting factor that you should all know about; and that has a great deal to do with the legal remedies or precautions that you may wish to recommend in this data bank area as a result of your deliberations. That is that the start-up costs are enormous and are likely to increase, where the running costs are already very small and are likely to decrease. This means that either, under the pressures of social judgment, the privacy and security issues, for instance; or under the property concern that the copyright and patent laws embody, under either of those pressures, you decide to advocate massive record-keeping systems, logs of utilization, and so on -- which you will see on the last page of my remarks I do indeed advocate -- the cost of doing this is really a negligible part of the cost of doing business, but that is as a running cost, ladies and gentlemen. It might cost a small fortune to get it going and, in fact, as I say, I think the cost of getting it going will increase as time goes on where the cost of running it after you get it going will continue to decrease, which I suppose if you are going to do it at all, the sooner the better.

Also, the rate of increase of start-up costs are not as spectacular as the rate of decrease of running costs. I think you can figure that the cost of keeping and outputting a log of utilization, for instance, just using that term vaguely, is probably going to drop by a factor of ten in the next ten years. The cost of putting such a system into being is going to double; it is not going to go up by ten, and even then it is mostly because programmers are getting more and more salaries all the time, not because they are getting less efficient. In fact, there is some question in my mind if they could be less efficient.

(Laughter.)

DR. GROSCH: It verges on zero at the present time. It cannot really go negative unless they went in there and started chopping off programs that already worked.

Specifically, the thing that is making this big revolution in memory cost and processing fees is what, in the Santa Clara Valley, we call chip technology. I live where the term Santa Clara Valley is often renamed Semiconductor Gulch. There is the world's center of manufacture, and, to a considerable extent, the world center of research and development in large field and integrated circuitry.

As an example, for those of you who are not up on this stuff, this tieclip was given to me two years ago in Japan and it has in the center of this little decoration -- I will pass it around the table -- I thought the fact that I was wearing it was a little more impressive than if I had a box full of goodies to pass around.

In the center of this is a little chip about a fifth of an inch square which stores 1,000 bits of data, 1,000 yeses and noes, or another embodiment could be a thousand switches for a processing system. This was given to me a couple of years ago as an example of how great the Fujitsu Company was in Japan. I went back last year and they almost disbanded the manufacture of this class of chip and were in full force trying on 4,000-bit chips and we are now delivering in Sunnyvale and Santa Clara a 16,000-bit chip, same physical size and approximately the same cost. So in two years, from the Japanese embodiment to the American embodiment, in an additional year -- you might say maybe in three years, we have got a sixteenfold increase at no increase in cost and, if anything, greater reliability. The reliability is almost perfect already. It is going further.

This thing really requires about -- even a thousand K-level really requires about a 30-power microscope to really see any detail, so you ought to take my word for it that it is there and is not just a smear on the face of the chip.

The Japanese are embodying the efforts of other countries and other technologies to catch up. They are probably the most successful competitor of the American expertise, but so far they have not closed the gap; they have stopped the opening. It is no longer widening. But they are still a year to two years behind us in spite of very, very heavy support from their government and a much higher degree of cooperation within their major industries.

I think, though, that you can figure that both the Americans and the Japanese will have million-bit chips commercially available by the end of the decade, by 1980, 1981. The Japanese have embarked on a hundred million dollar project and a hundred million dollars of government support and $50 million of industrial funds to the development of two million bit-chip capability. I am persuaded that IBM in this country already has something pretty close to this capability, although not in manufacturing form, and will undoubtedly exceed it in the Eighties.

The next stage of the game is to go beyond photographic techniques. These things are made by photographic processes, extremely high resolution photographic work is done using masks which are also made photographically. We are already at work in the United States making the masks which are carving them by electronic beams from opaque material. But we will use those masks in mass production still with photography and that gets you down to the level of tens of thousands, or hundreds of thousands of bits per chip, but at that stage of the game you reach the limit of what you can do with light waves. The structures that you try to make are then so fine that they cannot be seen with a microscope no matter how powerful the microscope is because of the finite nature of light and it will be necessary to go to other kinds of manufacturing techniques to go into greater detail. This will undoubtedly be electron beam.

At present, they are also exploring X-rays, but it will undoubtedly be electron beam technology. With that, it should be possible to store a billion yeses or noes on a little chip the size of that tieclip.

MR. KEPLINGER: In terms of characters or words of information, what are we talking about?

DR. GROSCH: Ten bits to a character; 50 bits to an

English word, roughly speaking. More if you are uncertain of the reliability of your medium and you put in a lot of extra check bits to make sure that everything is all right.

For instance, it has been proposed that a universal identifier replacing a Social Security number should have additional digits and decimals, and not be binary, of course, should have additional digits so you could tell by adding up the digits or having a check circuit in the credit card accepting device at the hotel desk or what have you whether it was a valid number. This kind of thing might expand your 50 bits to 75 or something like that.

When I say a billion digits, you are talking about a volume of the encyclopedia on one little chip.

That does not mean, however, any fundamental change in the nature of the information. I think this is important for your deliberations. This is primarily character by character, word by word, phrase by phrase, paragraph by paragraph information, stored in a way that is sort of uncongenial to computers. They really had nice binary numbers that just, you know, are nonredundant, unique, compact, and so forth. But alphabetical information, graphic information, all of the kinds of information that you are concerned with, including digitized music and things of that sort, can still be stored in this relatively uncongenial 011001 binary way. Because it becomes so cheap to do this and so easy to retrieve it, so rapidly possible to retrieve it, the economics of what you are watching changes although the basic nature of the information does not.

We are getting, for instance, to the point where the whole central activity in a newspaper editing operation is going to disappear across the entire world in a few years. Already in the very larger newspapers it has pretty well disappeared, at least on the experimental basis. This means that the reporter, sitting at his poor little battered Underwood, is replaced by an equally low-paid reporter sitting at a much shinier computer terminal and he types out his story with all the bad spellings and all the interlineations and all the second thoughts that he currently does on his yellow paper and it appears on the face of the capitalization. By fiddling around with it a little bit, he can clean it up. The computer itself will adjust the right-hand margin; will make sure that all of his hyphenations are correct; will check any misspellings that he has missed and, in fact, will do most of the job of the copy reader and the proof reader at present. A senior person can quite readily impose on that material either further editing or the typographical kind of stuff; can choose what size type it should be; narrow or widen the columns in case they decide to make up the front page seven columns wide instead of six. And still further computerized operations will enable you to put in the headlines; to insert cuts and photographs, and so forth. All of this will then go down and appear as photographic output ready to be turned into printing plates without the intermediate stages of copy-reading, proofreading, Linotyping, hot lead castings, stereotyping, and all the other stuff that goes on. I am not a publisher and I do not know -- not a printer -- and I do not know all the steps that are being replaced, but you are getting a removal of several normal old-fashioned interfaces and replacement by high speed, economical, non-unionized mechanical processes.

To that extent, the way in which information will be total is changing, but the basic value of the stuff inside has probably not changed. If anything, it may well be increased by the fact that greater output is possible; that a creative person can turn out more and better material using these techniques than they could with the yellow seconds and the battered Underwoods.

I still find it necessary to write, when I am writing creatively, to do it longhand, but then I am sure I am unemployable in the publishing industry, too.

Let me say one or two other things about devices that I think will interest you. Under F, Input Devices, I do not believe that we will have voice input to printed material or, let us say, recorded material in the near future. There are a lot of people working on this. I do not think there is any question that we will have voice, practical voice recognition, in special situations. In fact, in very special situations we have it now. The Post Office Department, our poor maligned postal service, is trying very hard to get a reliable, ultra-reliable accent independent system where it will recognize just the digits of the zip code so that a postal worker or a very poor one with a bad ethnic accent and a cold besides can nevertheless read the zip code aloud as he picks up a big awkward package, throws it into a single hopper and then it is sorted by the machine, a mechanical handling device, a thing it had before, besides the one to reduce the bulk, and will reduce it to the proper stack and out into the outside world. They already have the pounding device worked out. That is available now, but not economical. Places like Stanford have amply good voice recognition things for this, but they are expensive.

Now, with your chip technology sort of thing, you can have many, many more logical decisions for a penny. You can listen to all sorts of different characters of the voice thing. You are not going to reduce the cost of the transducer, the thing that listens to the human voice and turns it into bits because it is going to continue to be relatively expensive. It is going to have to have microphones, but then the rest of the things, the digitizing of it and the discrimination of that digit message down to the state, that is absolutely certain to be zero and not six. That will get cheaper and cheaper so that it will undoubtedly come; but I repeat, I think the chances of going from that to replacing the human stenographer or secretary so you can dictate and the typewriter turns out good English with archaic spelling is zero for the foreseeable future. If you could do it, you would not want to and I do not believe it can be possible to do it.

The thing that gets you is that you may, of course, find it possible to do this by transferring part of the intellectual load to the senior person. I can conceive of a system 10 or 20 years down the road where voice input would turn out a lousy letter which would then appear, you know, on your cathode ray tube at your executive's desk and then he has to plunk away at the keyboard and correct it. It is not, I think, verbal, but at a keyboard. If you were willing to spend some time typing up his letter you might manage to eliminate the human being that produced that first draft. I kind of doubt it myself. But to go beyond that, to the perfectly -- the perfectly turned-out literary quality thing is, I think, beyond our capability for the foreseeable future.

By the same token, we will not have automatic translation from one language to another or other similar things that depend on the intimate knowledge of human language.

Now, the network thing is mentioned here and I think it is very important to point out that networks are indeed spreading. What you really have at the present time and will have for the next five or ten years, at least, is a divergence away from the present old-fashioned moderate use of computers. You will have on the one hand smaller specialized machines referred to here at the bottom as minicomputers and microcomputers, which will be capable of being put into very simple situations. A shift in the handset of your telephone to record and transfer calls and things of this sort that should be in your typewriter to do elementary memorizing and photographing and frequently dictated letters and so forth. All of those things are easy. But they are valuable because you can have it inexpensively all to yourself. You can put one of these things in your typewriter and at night put the cover on the typewriter and go home. You do not feel any impulse to keep it used three shifts, seven days a week, as you do with a major computer program.

But in the other direction, to come back to the networking, in another direction we also see a growth of interconnection of big computer systems and big data banks and, of course, terminals for human access. So that large credit operations, large banking operations, large retail establishment operations, and so forth will all be knit together by these networks and from your point of view the problem there is that the input can be put in any point in the network, the output can be at any point in the network, and unless there are, you know, legally enforced logging operations, you will never know that it has happened.

Of course, I am also concerned about the social issue that the inputs, outputs, and interactions within the system may be undesirable from other points of view. Violations of copyright, that we may put together down inside without the civil libertarians knowing about it, we may put together two data banks and draw unauthorized conclusions therefrom and I have mentioned that very briskly in my submission to you.

I think at both ends it becomes difficult to control. I am more familiar with the problems at the upper end, the big network sort of thing. They are referred to more in that submission. But there is also the question if everyone has a little minicomputer, if you can have one in your home for less than the cost of an automobile, maybe ultimately about for the cost of a television set, especially if you use the television set as one of the output devices, that there is also going to be, because of incorporation, this small and controllable machine. It is a difficult question of improper use of copyrighting material. The very center which is the big push at the moment where the IBM and the Univac and Burroughs have done so well already, that is still growing also. But it is growing at a less rapid rate and less intellectual challenge. Little machines, very cheap, that you can use for anything, and a great big interconnected network which is enormously powerful, perhaps unauthorized, that I think you should direct your attention to.

Before I ask you for questions and stuff, I would like to go back to my submission and go down very quickly through it just so I make sure that all of you do not -- that none of you missed one or two of the things suggested here.

On Item 9, for example, on translation, let me amplify that a little bit. One of the things that we are always hearing about is computer conquests and this is one of the valuable things that are stored in computers, operating institutions, and often extraordinarily expensive programs that make the machines do particular valuable tasks. We're often told that these are written in a certain language or that they are stored away in such a way that they can only be accessed through, for example, the IBM operating system, or something like that. To make a change from one of these to another is often very, very expensive and very slow and very difficult and is regarded as a great intellectual or commercial achievement when it is accomplished. But, in my view, the basic information contained in that has not been changed any more than translating a literary work from English to French; as I put it here, phrase by phrase. That is without major deletions or additions. And I would hope that nothing that you do will change that situation and I think it is very important to say that when you go from ASCII to implement there are two ways of representing the task, in bits. When you go from FORTRAN to PL-1, as an engineering language, when you imbed what you have done in a data base which is contained in an IBM, a UNIVAC , an independent software house system -- I am thinking, for instance, here in the Los Angeles area of the Informatics Mark IV, data management system, that the translation of the fundamental stuff from one of these character codes or languages or overall operating systems to another should not be regarded as changing the fundamental information inside.

I have mentioned Item 10, about how I believe that if you decide that logs should be kept of where data is output from the system that the cost of operating that will not be excessive in the future; but, I repeat, the cost of starting it off will be a whopper. And I am sure that when you talk to people that have large data banks already in existence, credit bureau type of operations, they say, "We can't possibly do all those controls you want us to put in. It will cost us a fortune." In one way they are right; in another way, not true.

If I may ask you to make one small change at the bottom of Page 2, Data Output for Control. My secretary made a small mistake. Third line from the bottom, "Check the correctness of entry," comma, "processing or output." That is three things. "Entry," "internal processing," and, "output." Otherwise it is all right.

I will mention just in closing, my second thing in Item 3. Although I am not appearing before you as a representative of my association, I might mention that people in the computing -- I prefer to call it trade but they like to call it profession -- have both the duty and an interest in this sort of thing. We are the people who, to a very considerable extent, will be creating and manipulating the systems, the data base and processing systems that you are concerned with in these meetings, and we would like to be sure that we know what is right and what isn't right. Many of us -- you have heard me -- feel that we have some ideas to offer in the matter and are anxious to make sure that all our small inputs are of value to you. We are going to hope, through our committees on professional matters and our activities with respect to data base management, business data processing, programming, languages, and so forth, to incorporate in the works that you give us and keep abreast of the legal situation and the legislation that comes out of this activity.

With that, I would like to see if I can get some questions and discussion.

MR. SARBIN: Thank you very much. That was very good for me.

DR. GROSCH: Thank you.

MR. SARBIN: I may not express my question as well as I would like to, but thinking about your comments on the way in which the technology will expand our capability, dealing with that, it is so enormous. Would you comment on how pervasive in the society the use of this particular technology may be in business communities and our private lives?

DR. GROSCH: I think you can figure that it will be the most important single technical input to our ordinary everyday life in the very near future. It already pervades virtually everything we do, but it usually is a second-order effect. Let me see if I can illustrate this with banking.

At the present time, what you do at a bank is still pretty much what you have always done, but down underneath, second order, the amount of record-keeping, the fanciness with which your statement is presented to you, the promptness and error-freeness of the system, depends on very extensive use of computers. Now what happens next is these guys are now tempted by certain things. They are tempted by the desire to do things more economically, to get rid of some of those tellers; to get rid of some of the data processing people in the back room; and also they are tempted by the float, all that money running around loose that nobody is getting any interest on, from the time you write that check until the time it actually gets back to you and the money disappears from your account. So for one reason or another, whether you believe it, you might say it's economical and all that, or perhaps something a little closer to greed. The banks would like to tie themselves all together and have what I used to call -- I used to call it my electronic money. You push a button and, boom, it's gone. Now that is a first-order change; it is not a great big one. We can live without accounting or checks, although I would find it difficult, but one can. But it, nevertheless, is a real social change.

By the same token, for instance, in an entirely and very much more pressing sort of matter, we have always had the possibility of a FBI or CIA or other police agency in other countries poking down into our private lives and searching through what we do in great detail and really stringing us up by the thumbs if they want to do it, but it has always been a very expensive and very specialized thing, a lot of tracing; you have to go around and talk to the neighbors and your neighbors tell on you, and this sort of thing.

Now, when you get everything all knitted together and you get these banking networks, retail purchasing networks, the credit card sort of thing, when you begin to buy all your transportation credit cards or automatic terminals on the outside of the airport like the easy money terminals and the supermarket in Seattle and so forth, as you begin to do this, the possibility of incursions on personal liberty become very much more, and Arthur is an expert on this sort of thing. Once more, it becomes not only economical to do it but you can do it very quietly. Some little old guy there reading all about what you did yesterday and he can get it printed out for him, boom, at his terminal in Washington while you're sneaking around taking that blonde out in Seattle. Real time. Before the check comes -- no, not before the check comes. Right after the check comes. Well, you can get the bar bill first. So those are, again, first-order things.

Education: there is no more conservative field, as the professors around the table will admit, no more conservative field in our culture than education. Professors are very starchy, teachers are even starchier, superintendents of education and principals are somewhat more starchy than bricks, I would say. But regardless of that, there is such an enormous possibility for change in these new technologies, not just the possibility of hope studies and things like that. That is obvious.

But the possibility, again, a first-order sort of thing -- a possibility of fairly straightforward interaction between a data bank containing ultimate paths of instruction and a slow, lazy, remote but perhaps, nevertheless, ambitious human being.

We have seen in such elementary forms as the talking typewriter, that you can take to ghetto kids who are normally almost destructive towards a human teacher because they feel the teacher has contempt, they do not want to be in the school, they feel put upon; but they will play with a machine. This does not always happen. Some play with a machine by hitting it with a rock. But a lot of them will play with the machine, interact with a machine; the machine does not exhibit prejudice and it does not make ugly remarks and it does not get tired. You can get the same answer back 18 times and it will poke at you each time with an improvement. In sophisticated systems it may give you 18 different improvements until one finally strikes hold.

So the possible way in which you might educate people, either in an adult mold or even in the school mold, becomes possible. I think you can say that this will be --

Now, to get back to economic terms, I have been saying for some years that I believe that by the end of the century -- not the end of the decade, but by the end of the century -- you will see knit together, economically knit together, and probably regulated in the unified sort of way, all of the information industries of the United States, that you will have not only the data processing and the data communication industries which are already moving together -- they are both under Anti-Trust at the moment. If both get off, they can hook together and so forth. But all of the ancillary activities that you are concerned with: publishing, television and radio, the entertainment business, audio recordings, tapes, records, and so forth, all of those things are characterized as having information as distinguished from, say, heavy power, like nuclear energy or transportation or mining or agriculture, which deal with big gobs of things. I see that the knitting together of that as being an absolute consequence of technology, the same little old chips, the same microwave links or the satellites will knit the whole business together. The same satellite that is making sure you see all these dumb TV shows from coast to coast will also be carrying data communication, will be carrying digitized forms of entertainment and so forth along with the audio forms or the video forms you are accustomed to and the natural thing is, okay, let us put it all together; let us regulate it; let us work with it.

MR. WEDGEWORTH: You made a statement earlier I found fascinating in terms of how we actually approach the problem of controlling the use of copyrighted works that get into large computer banks. I understood you to say that we need to be concerned about what happens, say, in a very large computer data bank, how that material is output; and also that we need to be concerned about, say, the home all-purpose receiver for video, audio, as well as digital information.

I am not sure that I understand the latter part of that. Are you saying that we really ought to be logging what comes into each of those home units or maybe like the Nielsen, you might want to have a sample log of a number of units simply to double check the logs that are being kept in the major computer data bank?

DR. GROSCH: Let me give you an example of one thing that has happened right now that, I think, without much effort you can expand to a parallel with art, phonograph records, and things like that. There is an enormous growth in the last couple of years with what is known as the hobby movement in computers because these chips have made it possible for the basic data processing that used to be done in almost a roomful of machinery to be done in one little thing the size of a postage stamp. One of these chips imbedded in a plastic container with some leads running out of it, it is now possible for hobbyists to build their own microcomputer for substantially less than a thousand bucks. The basic chip, the thing that is actually doing add, subtract, multiply, and divide is, at the present time, around 65 bucks in the retail store; cheaper if you buy a thousand at a time. There are stores springing up in all the large communities across the United States called Byte Shops, byte spelled b-y-t-e, which means eight bits in a IBM machine; called Byte Shops and similar names. People flock to them the way they flock to the Radio Shack for audio equipment.

These people are hungry for things to do with these machines after they put them together for two hundred, five hundred, or a thousand dollars and they want to do something with them. At present what they are doing largely is to trade games around between themselves and so forth. Most of these are not protected. They are written by enthusiasts and the more they are used, the more enthusiasts prowl. But some of these software packages, as we call them, are to be protected in some way. They have been made commercially and what is happening is that these are being ripped off in enormous quantities. The minute one copy is sold, duplicates of it on paper tape, or what have you, are given away by the person who buys them to all his friends, just as rapidly as he can.

Now, if you assume that there is a big market, if you assume that all the middle-class and upper-class homes in the United States are going to have something like this, maybe if only attached to their TV sets so the kids can play Ping-Pong, then you are going to have an awful lot of encouragement on the commercial and an awful lot of desire to make commercial profit out of this and an awful lot of almost uncontrollable incursions on it, very similar to the way in which people trade tapes and recordings around in the audio entertainment area.

MR. KEPLINGER: If I may make a remark. I think both Fairchild and RCA are planning on bringing out a game played with microcomputer systems that will attach to your TV set at home which you will have plug-in modules to transmit this very kind of program.

DR. GROSCH: We are talking about something substantially larger than the juke box industry.

MR. WEDGEWORTH: I think we understand that and you can overplay the remarks that really impress people about technology. But how different is that from saying that anybody can go out to any shop and buy all kinds of audio equipment and listen in to conversations that may have all kinds of strategic and economic value? It is still illegal. How do you prevent that? Do you make the sales of that kind of equipment illegal? I think what we are going to have to come to grips with once we get over being impressed with the enormity of the problem is what, if anything, can be done to control it? That is really the crux of my question, because we had assumed that -- at least I had assumed that in looking at this problem it was extremely difficult to control this activity beyond the broadcast stage and I thought I heard you say something else and if there is something specific that you had behind that remark, I would like to hear it because it certainly defies my imagination at present.

DR. GROSCH: I do not think it is impossible to control it, but I think it is probably socially difficult to get that control accepted. It would not at all be impossible to control 80 or 90 percent of this sort of thing by technological intervention, if people would accept it.

You were going to say something, I think. Why don't you break in?

MS. WILCOX: I was going to ask, with this control, some people have suggested that you can, with information, put them all together, you could have a meter on your own TV --

DR. GROSCH: That is the sort of thing I had in mind.

MS. WILCOX: So every month you get a bill like you get a bill for water, gas, electricity. What implications would this have for copyrighters? Are you saying that the plug-in cost of installing that would be difficult?

DR. GROSCH: My personal advocacy to you people is that wherever it is possible to log this kind of thing, that you advocate it. I recognize that you may not feel this way, and I repeat, I think that there will be a lot of social pressure against it from hobbyists.

I write editorials and send letters off to hobbyists' magazines and so forth. I just wrote one yesterday to computerists in the Massachusetts area telling them, "Steal it, goddamit." But the fact remains that even if you come to a social thing, the question is, do you really want to get into anything that is complicated? I have a letter here from a young lady at Burroughs in Pasadena. She wants to put an invisible code on every page of copyrighted information which would be read by a chip in a Xerox machine. Every time it is copied, three-hundredths of a cent gets sent off to an author. That is technologically feasible; you could do it. Terribly dumb idea, but you could do it.

MR. NIMMER: Would you expand on why it is dumb? What are the problems?

DR. GROSCH: I guess my first objection is aesthetic. I do not like to feel that every time I leaf a page -- even if I can barely see the thing -- every time I leaf over a page in a fine edition that there is a bar code at the bottom of the page.

MR. HERSEY: Surely the technology could bury it in the print on the page.

MR. GROSCH: I suppose they could. I sort of have a feeling of crossing Shakespeare with a Cheerios box. It kind of bothers me -- not that I'm all that keen on

Shakespeare. But let's say Arthur Clark. You could do it, though. Most of this could be done. Mind you, you always have pirates. Don't get me wrong. There will be always be some guy that will put a piece of paper over it before copying, but most people won't object to this, you see.

You take your commercial Xerox machine in a supermarket and you are charging ten cents, one-tenth of a cent is sent off to the author through some kind of a logging mechanism. That will not shut you down.

MR. LACY: I certainly applaud one thing you said and that is that we ought to recognize that rapid rate of change that exists for the indefinite future in this area and try to confine what we do to setting forth general principles in the whole enactment of the copyright law that seems about to pass now, the actual history is being of a bill that the author had in mind has been subjected to pressures from both sides with people who are uncomfortable with the ambiguity and effort to define everything and it has gotten to be that thick. It is already obsolete and it has not even been passed yet. I think it is terribly important that we try to resist those pressures and stick to principle.

But turning to the actual content, one comment of yours troubles me a little and that is the suggestion that so far as we are dealing with the issue of the input of material already existing and already under copyright on a computer that your belief would be that the input itself would not be considered a use subject to copyright and neither would the manipulation of the data within the computer, nor the output from the computer if it were small portions of material, such as might be considered to be fair use of a copyright. This bothers me for two or three reasons.

Now, one is that some of the uses of materials that are clearly proprietary and where clearly advantage is being taken of somebody else's investment may not involve printout at all.

Let us set up a purely hypothetical case that there is a firm that publishes the text of public domain statutes and court decisions and, hypothetically, this firm has worked out rather an elaborate system and has indexing and this material was numbered, and if another firm puts the same material into its computer, including both the public domain texts and the copyrighted hierarchy of material, using that as one of the descriptors with which a person could elicit material, there might be no output of this material and, yet, somebody would have taken advantage of somebody else's substantial work. Purely a hypothetical case.

But the second kind of thing, there is a tradition established in credit reproductions that the quotation of a small excerpt is fair use and all of us have seen speeches about some topic that start out saying, "Webster defines the word about which I am speaking in this way:" And it clearly is a fair use. This is not competitively Webster and nobody can use that speech to look up words. But when you incorporate -- and this again is a genuine hypothetical question because it would not be economical to do it -- but if you incorporated all of Webster on a data base, from computer data base, from which one could extract not merely the one definition that was quoted but any definition, you have replaced the dictionary even though no excerpt comes up more than small. So I think that really points to a different test of fair use.

In the third place, if you consider that there are inputs that would need the permission of the proprietor of fairly extended text, what do you do when the computer starts to output a fairly extensive text? By definition, this is unforeseeable. You do not know it is going to do it until you ask the question and this gives this as the answer formally.

Does one assume that there is going to be a compulsory license so that nobody can object to this and one has got to permit it and accept a stipulated payment?

It seems to me that there is really no real reason for saying that input, if the input may result in an output for one reason or another, is as should require permission; permission should not be gained at the point of input. It seems to me logical and convenient that you have one permission govern everything else and everything else is wrong focus.

I would like to turn to one other thing --

DR. GROSCH: May I answer that for a moment because it is a very important philosophical point. If, as you say, you are going to produce broad recommendations rather than three inches of detailed stuff, this sort of thing is exactly what you'd be concerned with and I thought very hard about that entry thing. This information that I have given you here essentially came from the time when I was with the Bureau of Standards and was assigned to interact with McClellan's Committee, five years ago, I guess it was, roughly. And I thought very hard about that input thing and it was my conclusion to make this recommendation because I am assuming that the data from which you made the original input was something you had already paid for. In other words, you had a copy of something that was worth a lot of money and you had bought it. Now, the question was, do you put it into your machine to process it without violating the copyright; would that be fair use?

Let me give you an example: The publisher of Computer World, for which I write articles, puts out a great, big thick compendium twice a year of all the computer installations in the United States that he knows about. It is a great big thing like this (indicating). The computer printout is almost a foot thick and he sells that for fifteen thousand bucks a year subscription for this, not printed, and each page has, you know, copyright stuff all over it and a statement, "If you print" -- "If you use even one line of this, you are in violation of the copyright," and blah, blah, blah. I do not know the whole legal terminology of it. But there is a case where he doesn't want an unauthorized person to see even one line of that. But, on the other hand, you can't put that into your computer without having paid the fifteen thousand bucks in the first place.

MR. NIMMER: Are you saying, in a comparable situation, if a library buys the Encyclopedia Brittanica they should have to pay something like $15,000 for one set of the encyclopedias?

DR. GROSCH: No. I would be prepared to let the Encyclopedia Brittanica sell for its present five hundred bucks and then if the library wants to go ahead and key it into the system, perhaps then -- of course, that is also going to be obsolete -- data entry costs are going to come down because you are going to have character reading devices that will do for a tenth of present costs, not a thousandth but a tenth, at any rate. If they want to put it into their system, I think that five hundred bucks authorizes them to do so. But having got it into their system, they can't put it out again without paying.

MR. LACY: Can they put it out if the output is saying, "When was Charlemagne born?" Because the one copy in the central computer could supply all --

MR. WEDGEWORTH: You could be saying in effect that there would be nothing wrong with what Dr. Grosch is suggesting provided that whatever internal manipulation of that data would not substitute for the purchase of a particular work in question and if they are doing what you are suggesting that they are doing; that is, in fact, substituting --

MR. LACY: The whole point, I think, is the simplest thing; if there is any possibility of getting permission to get it at the point of input and be done with it.

MR. GROSCH: I only wanted to tell you that I had thought about that. I do not see that my opinion on this is as valuable as yours since you have been exposed to this much longer than I and you certainly know a great deal more about it than the man in the street because it is essentially a moral judgment, not a technological one. But I did think about it.

MR. LACY: There is another question on which I would certainly welcome your views. I have had the feeling for some time that we have obviated ourselves in debating what is the question about computer data bases, that within a little bit in that condition printers might have been -- and proprietors of scriptoria that put out manuscript versions of books -- might have been about 1460 and the printers would all say that there would be no copyright on these manuscript books; we ought to be able to incorporate them into new technology and scriptorials were to buy copyright and then after half a century the printers realize they have all the books in print and they shift over. That has happened here.

I was fascinated to hear the testimony of the representative of Educom requesting some very high protection for computer programs because of the fact that the universities that make up Educom have developed so many programs where ten years ago their distinguished representatives were taking a low protection position for computer programs.

DR. GROSCH: Don't you listen to that guy. He did all those programs --

MR. MILLER: Which guy?

DR. GROSCH: Educom.

MR. MILLER: The current one?

DR. GROSCH: He and his buddies, with public funds, by golly, and now they want to go out and make some private --

MR. LACY: I think the situation is within the --

DR. GROSCH: Before, Arthur, they didn't have the funds yet. They said, "Give us some of that money and we'll give it away to everybody," and we made the mistake of giving it to them.

MR. LACY: The main weight of proprietary right in this field now exists not in people who have written something in print and copyrighted it, that might be put into a computer; but it exists in people who have accumulated within a computer enormous data bases at great expense, maybe every data of which is the public domain, which is --

DR. GROSCH: The organization is very valuable.

MR. LACY: The question that has concerned me, at least, and I think others, is what is the social and most useful way of protecting whatever value investment is there providing incentive for continuing that without being restricted. Right now these proprietors protect their rights by keeping them secret and by permitting access only on stipulated contractual conditions and many of them do not want copyright protection, as a matter of fact, at all because of the feel that under Section 301 of the new bill it is a copyrightable right; it cannot be protected in any other way. They would rather rely on trade secrets. That probably works now. I just have an innate feeling that any mode of protecting intellectual property requires you to protect it by restricting access to it; is inherently not assigned.

DR. GROSCH: Socially undesirable unless you have to absolutely do it.

MR. LACY: But over 50 years ahead, we might want to be in an environment in which the data bases embodied in some very cheap form would be not at least, but so, as these programs --

DR. GROSCH: Obvious programs.

MR. LACY: Whatever counsel you have got. Now, not the question of putting copyrighted stuff into a computer but, what sort of copyright provisions with respect to the rights that may have been accumulated by the proprietor by the data base and organizing, that kind of makes us wise on that.

DR. GROSCH: I doubt if I can make you wise.

JUDGE FULD: I think it is more knowledgeable.

DR. GROSCH: I am not sure I can speculate effectively because I think that the basic problem is that you have to have a set with respect to social trends. My set is somewhat described here, although only in three lines. I guess what I am looking for in the world of the distant future, if we survive which is dubious at the moment, is a very much more open world than the present time. There are many people, I think who feel that we are going into another direction. For instance, in the privacy issue: one solution to the privacy issue is to go -- you might say -- in the Scandinavian rather than the Swiss direction instead of keeping all of your information about yourself;

your bank accounts, your medical records, and so forth, very tightly held. You know, just spread them out on the table and say, "I don't mind if my neighbor knows I have venereal disease. It's just another disease."

If you go in that direction, then the need for copyright begins to recede because the value of compilations and so forth, compilations will be considered to be sort of in the public domain, it seems to me. My boss, Pat McGovern, will no longer be able to object for some one person, for one line in his huge data base, being excerpted on the grounds that he got that one line free of charge from somebody down the road and his value was only in having them all in one big heap.

I do not think you should ever get into a situation where you will eliminate the artistical value -- I am not talking now about compilations, but about a beautiful poem, a magnificent play, even a very cleverly written textbook. There, I think, is an element of unreproducible skill in the thing. You cannot just say anybody could go out and do it if he wanted to. And that, I think, copyright ought to protect, as long as we can see in the future 50 or 200 years.

MR. MILLER: Can you draw that line?

DR. GROSCH: Very difficult, but then there is the problem of the law, isn't there? When is it all right to shoot a guy and when isn't it? The answer is, if you are an authorized soldier and he is an authorized enemy, go ahead and shoot him. If it is your wife, don't do it.

JUDGE FULD: Of course, you have our very deep thanks for a very interesting and very illuminating address.

DR. GROSCH: Thank you. I enjoyed doing it.

I would like to stay and listen for a while, if I may.

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LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 2:50PM

JUDGE FULD: Our next guest is Dr. M. Thomas Risner. Since 1966 he has been involved in the systems design, implementation of the world's largest data base of non-print educational materials, compiled in conjunction with the Library of Congress and the National Information Center for Educational Media at the University of Southern California.

The accomplishments of his career is the publishing of 20 volumes of indices on nonprint media in book form, as well as microfiche. He worked earlier in the area of communication management, research, and teaching. He is published widely in these latter areas.

Dr. Risner, the Commission is happy to hear from you.

DR. RISNER: Thank you. There is only thing more traumatic than parking at UCLA and that is attempting to park at USC and I am happy I left an hour earlier or I would not have made it.

Today, to this very prestigious Commission, I want to direct my comments particularly to the background of this information storage and retrieval system; the general make-up of the information system, defining the input and the output; and then an interpretation of how the system relates to the proposed copyright changes as we interpret it; and then, finally, I want to present a summary, based on the questions that Mr. Levine presented in a letter dated August 17.

Now, once I have completed the presentation, I do have a handout of the general summary of the presentation that I am about to make and I will give that to you afterwards.

Approximately 14 years ago the Office of Education provided a $115,000 grant to the University of Southern California Division of Cinema to study the feasibility of computer application to the handling of information on films. At that time, USC had one of the largest film libraries in higher education, as well as the only what was called then Division of Cinema. So this seemed logical and natural that it start there.

The only thing that happened out of this $115,000 grant was that eventually it grew into probably the world's largest data base of what librarians call non-print educational media. Today we are right now in the process, as a matter of fact, of publishing approximately 25,000 pages of index material which we sell to all parts of the educational and library communities, including the international community. 12 percent of our sales and indexes, whether it be on microfiche or in hard copy, it is sold as far away as Malaysia, the Middle East, Israel;

a great quantity of these materials are sold in Canada, as well as Western Europe and thoughout the United Kingdom.

As a result of this project, it was determined that it was feasible and, as I jumped ahead here and stated to you the basic results of the project, to this date, the University has spent approximately $4 million developing this system and expanding it. Now, remember, the $115,000 was the seed money provided by the Office of Education. To this date, there have been no other funds other than what the University has plowed into it. Of course, at USC, it being a private school, there is only one reason you stay there and that is if you can raise the money, and that is, in a sense, literally true. You have to pay your way, whether it be in the classroom; whether it be in research; whether it be in development. As a result, we, in a sense, with this type of development to a computer data base, are in the marketplace and we are in the marketplace to a large degree because we found, through publishing contracts with such prestigious publishers as McGraw-Hill and R. R. Bowker and Xerox, that it was not a profit-making type situation and, again --

DR. RISNER: I know that your ears are full and your minds are full of knowledge and maybe you can relate something to me because it was very interesting sitting in on his extrapolations.

Again, the University felt, as all good universities should feel, that they are there to serve the national and international needs and, as a result, something good has come of this data base.

Today you are particularly interested in our opinions on the new proposed laws and amendments to the copyright bill as it is stated in S22 and how it relates to this particular information system, and this is why I am giving you the background and going through the developmental part of the system itself.

Now, just briefly extend yourself to the front of the room here. Can all of you see, by the way? Can you gentlemen see through me? I doubt it.

MR. HERSEY: Step around it once in a while.

DR. RISNER: Okay. Input, your editorial research, your data base, and this can include all the systems development, all the programming, all the designs right here. This is the raw input, so to speak. The acquisition. This is the actual manipulation storage and the integrity building of a file, we might call it.

This down here -- can you read this? Is this clear enough? This is what we would call output. Where does the National Information Center for Educational Media receive its input? Producers and distributors, people who produce and distribute it. Remember, we are a national center. We have to publish in our indexes things that are available to people, they can actually get their hands on them at one point in time. The Library of Congress, back in '67, the University and LC entered into a mutual agreement that they would set up an input form to collect all data in a uniform manner from producers and distributors. If producers and distributors want to get their information into the LC Mark system, which is also computerized, highly computerized, if they want to get it into 3 by 5 cards, if they want to get it into the NICEM Data Bank, which is also an output system, they are very motivated to send their input forms into LC.

We deal directly with schools at all levels and most of them have what they call media centers, either separately or as part of their library system, and we deal with public and private libraries. In dealing with these two, we do contractual work for them so we, in a sense, receive input from both of these, which we call unverified input. It has to go back through a research process to make sure we do not get some local production that is not available nationally. If we do get that local production, we can flag it in the data base and it never goes out other than if it is for, say, Boston Public Library. But in a sense we carry every nonprint item that Boston Public Library or Chicago Public Library, both could not contract for, on nonprint media catalogues in our data base. If it is mutually available it is for everybody; if it just for those two libraries, it stays in the data base and it is flagged as such.

In our editorial research division, we have followed the Anglo-American rule which basically is written by librarians in the Library of Congress and is approved by the American Library Association and they are the publishers -- ALA is.

Also, we follow some guidelines put out by the American Association of Educational Communicators and Technologists. Between these two publications, it gives us the guidelines by which we editorialize and we research these matters out to make sure they are valid entries and they go into the data bank and they are stored.

The output -- and here is where we start getting into what we came here to talk about in a sense -- machine-readable tapes, indices, book copy, and microfiche copy, what we call custom book catalogues, which are rather common throughout the library world today -- search service -- and, by the way, the search service is primarily done for large companies like Eastman Kodak, that want to know the average length that the color film produces between 1956 and 1976. Obviously, they are getting this data for marketing purposes.

Then we have just signed a contract with Lockheed Information System in Palo Alto using their DIALOG system to place the entire data base on line for their customers, so in a sense you get an overall picture, I think, of what a national information system grew to from a measly $115,000. It was nurtured primarily in a university environment.

To give you some idea of what the data base consists of, here are the different media that we encode into the data bank and out here are the numbers of main entries that were in there as of March. Now, each entry contains approximately a thousand characters. There are 21 descriptive elements and I want to talk a little bit about the descriptive elements because that is one area where we think there has been some creativity in the data base, even though as one gentleman said, a lot of this information that goes into these general nationalized data bases is in public domain; it goes into the system, but what happens to it after it is out and into the system and how does it come out of the system?

Our '76-'78 description, which we sell, again, to the educational library community, consists of 20 volumes with the 14 titles. We update these just like an encyclopedia. We do these custom jobs, contractual jobs, which also involve information in data banks.

DR. RISNER: We were currently at that time negotiating this ongoing access and then we do special searches and analyses for different individuals and companies who want to come to us.

Presently our user base -- we have on our computer files 9,653 institutions or individuals who use our information. These are educational industries, government, libraries. 12 percent of the total are overseas users.

Now, some of the elements that are in the data base are the 21 elements that we talked about. You have basically the same type of information as you have, say, on an LC 3 by 5 card. In this case, it is in a special data bank. You have a title, with a subtitle, the size and physical description, the length, all of these things we have no control over. We just record them as we verify them. You have a stock, in the case of motion pictures and video tape. In the case of tapes and records, you have to designate whether it is monaural or stereo.

Now we get into No. 5, the description of the contents. This is where we have designed the parameters for writing what is in that particular title in order that the user may read the description and make an educationally sound decision, whether it is worth getting ahold of for his purposes. The series, titles, reference, whether applicable, the audience or grade level, again, we do some assignment of grade levels or audience level, producer-distributor codes attached to the information. These are codes that are developed by us. The year of release is something we have no control over. The Library of Congress members, broadcast quality, these things are in a sense in public domain. The thing that we think that takes creativity is: One, the description of the item in the data bank relative to its contents. We think the search strategy, how we catalogue it, is something that is creative in a sense. As far as the formatting and the output, it is our belief that this likewise is part of the total system and is part of the creativity of developing the total system. Again, our output, these are the types of books that we publish from the data base currently. There are many other possibilities. It is simply a matter of economics of what we do publish. We can publish them by media or we can go in and publish them by curriculum or subject areas. For example, the index of Health and Safety Education, the index of Vocational and Technical Education, Environmental Studies and indexes to free materials. All of this is easily done with a computer.

Currently we are negotiating with the National Library on Medicine to do an index on medicine which, in a sense, will supplement the abline, except that the abline is an on-line system which takes into account only those titles which have been approved or evaluated by the medical profession. The index we would produce would be a comprehensive, universal index taking in all facets.

A typical page in our index would look something like this (indicating). This would be in the alphabetical file section. These indexes are set up pretty much like a card catalogue file in the library and this would be a sample of the -- here would be the producer and the distributor codes, the title, the biodata film strip of records and a brief annotation of what is on the data bank itself.

We can turn the lights back on.

DR. RISNER: Now, the implication is, from our point of view, relative to -- particularly Sections 107 and 108 and this data bases, National Information Center, through our interpretations of Section 107 and 108 of the S22, and there was a Senate report which discussed it entitled -- "Numbered 94 dash 473." It is our opinion that the limitations on exclusive rights contained in those particular sections will have little or no impact on the NICEM operation. As we read it, 107 permits fair use of the copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarships, or research. If I may quote from that discussion paper, the 94 -- the section, it states, "Is intended to not necessarily change the judicial or legal parameters of fair use, nor to narrow or to particularly enlarge it." So we feel that there is really no threat to this data bank system as it exists today and I can extrapolate on that a little more a little bit later.

The section set up for criteria, for determining this and, that is, that the purpose and character of use, the nature of the copyrighted work, the amount and substance of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for value of the copyrighted work. In view of the nature of the NICEM output, as we have displayed it here, it appears fairly remote that the indexes themselves would be used for teaching, but certainly they would be used for scholarship and research. In this regard, we would expect that citations of small portions in research reports would be permitted as fair use. That is our interpretation.

However, in view of the criteria 3 and 4, we would expect that any citation in excess of a very minor portion of an index would be considered an infringement. We would not want somebody to copy it in whole and distribute it, particularly if it were available at a price.

I put together a very simplified -- the real cost of copying -- and let me throw this in briefly -- these figures are based on 1974 Information Almanac. But the school districts in the United States, there were 17,000; elementary school units or buildings, there were 65,800; high school units, 25,352; higher education institutions, 1428. Believe it or not, Federal government and military training commands, there are a tremendous number of those -- and we sell to them quite regularly -- 1800. But there are 52,000 libraries and branches in the United States, too; 111,380 units here. We published 23 volumes at $605.50 and this seems ridiculously high but at the time time when you carry it back through the costs, we find it is almost a nonprofit type of situation. I think this is one of the reasons that it was not commercially feasible with McGraw-Hill or Bowker. Times 111,000 equals 67 million. Now, that would be the ultimate, if you sold everybody a set. Obviously we cannot and we could not.

If we took the 16,000 just in those 23 volumes, 666 pages times the cost of copying, five cents apiece, $833 times 111,000, you would see it would be substantially more to copy and the only problem is that there is, we find, a syndrome that exists in educational institutions that -- or I guess it exists in just about every department that human beings are involved in -- if the copying machine is there and the paper is there, it does not cost anything to copy it. I know that the copying machines in our institution have to be controlled very carefully with keys and so forth because there is a lot of unauthorized use.

In our opinion the Section 108 permits reproduction by libraries and archives but only under circumstances which are sufficiently limited as to preclude any significant impact, say, on a NICEM-type operation.

Section 108(a) permits a single copy to be reproduced but only subject to the conditions of the other sections. In this regard, and, again, we are interpreting it from our standpoint, Sections 108(c) and (e) which permit reproduction of an entire work require that a reasonable effort be made to determine that a copy of the work cannot be contained or obtained at a fair price.

Section 108(d) permits reproduction of only a small part of the book.

Section 108(b) refers only to some published works, so it would not, in a sense, interfere with us.

In the report discussion, it is explained that any determination of availability at a fair price will always require recourse from commonly known trade sources or even from the publisher, so we feel in that sense some -- for example, the L.A. public school system could not buy one set of our indexes and then immediately reproduce it for all of their individual buildings; we feel this would be an infringement.

In our opinion, the libraries and educational institutions could reproduce one copy of indexes only if the copies were not otherwise available at a fair price.

One other section -- or the section in 108(f)(1), it is our opinion that no relief from the liability is provided for an institution relative to its employees for mass duplication of copyrighted matter. In Section 108(f)(1) it exempts the institution or its employees only from unsupervised use of reproducing equipment located on its premises, and then only if the equipment displays a notice that the making of a copy may be subject to the copyright law.

Section 108(f)(2) makes it clear that even this exemption does not extend to the user if the user exceeds fair use and, again, fair use is defined.

The recommendations and interpretation is based on the questions that were presented in the letter. First of all, what constitutes a copying? Again, it is very difficult to discuss this without becoming philosophical and, in a sense, taking all social and economic factors that enter into this type of a question. When we say the transformation of a work in a machine-readable form such as punch cards, mag tape, or disk or any other type of device is a prerequisite to the retrieval of information with universal and format possibilities existing based upon the sophistication of the system. I guess in a sense we are saying copying is copying regardless of how it is done or how it is achieved. There has to be, in any system, initially a formatted procedure for entrance. We talk of character recognition, but at the same time there has to be a form developed. There has to be some parameters and rules and regulations for getting the data on there to be scanned and it cannot be just scanned in a random manner, particularly.

These modern technological means of capturing data are simply techniques which allow the rapid and massive storage of data fielded in such a way as to allow the user quick access to large amounts of information. The copying is the same whether by handwriting, keyboarding, scanning, it is copying; the latter requiring more definitive parameters since the very nature of such copying with technological devices makes it mandatory for initial and precise definitions of input. Copying is copying whether by ancient or modern means.

Data bases just do not happen. The use of, say, cathode ray tubes, devices in the interrogation of machine-readable files, is copying simply by the nature of the required organization of the files prerequisite to the ability to retrieve and display information on a CRT for printed card copy.

In presenting some of the historical background information in this particular system, the point to recognize is that a data base and the supporting systems for the base is a process. The output is dependent on this process and the process, as well as the final output, must be protected since, in this particular case, the system and the data base is dependent on the revenues from the output. The doctrine of fair use applies only as we interpret the meaning and, as we presented it earlier, relative to our output which is primarily the indexes and, believe it or not, we can talk and we can read about the technological advances in information handling; we can belong to ASIS ; we can go to the conventions, but in the final analysis, the human being, in a sense, returns to the printed book. We have figures to prove it because we offer ourselves on microfiche, machine-readable tape, and in book form, and, believe it or not, they have knocked down the doors for the book form and they continue to, year after year. Some of the more sophisticated institutions and, I think the MARC -- the MARC system in the Library of Congress found this out. MARC was developed to take care of the information needs of the small libraries all over America and in Canada. In the final analysis, when MARC was up and running, they probably had maybe six to seven institutions that could effectively take those tapes and the documentation and do anything with them. Those were the very sophisticated institutions. One of them was not an institution. I think it was, at that time, nonprofit. It was System Development Corporation; another one was Rice Institute. But the vast majority of the libraries had no use for MARC and now they are getting some use out of MARC because MARC is generating a 3 by 5 card which they continue to place in their card files.

One of the attributes of a computerized data base information system is its ability to make mass changes internally, hence there should be a distinguishment relative to proprietary rights and the ability of the system to change data -- excuse me. There should not be a distinguishment relative to the proprietary rights and the ability of the system to change data, to make corrections and deletions. The proprietary right, under the doctrine of fair use, should be protected even though data items may be subject to constant fluctuations and subject to change. In a sense, you cannot separate the system; they are both dependent on each other: the data base and the system. The data base on tape or on a disk or any other device, storage device, is totally useless without a system and a well-documented system.

Proprietary rights should extend to the equivalent of performance rights as defined under the doctrine of fair use. We now, for example, if somebody is going to publish something with our material in it and they are very good about it, they do come to us, obtain permission and pay for the use of the information. Output requires special talents for success of any modern information system and we would like to think that this would be true of the information system that we have presented here to you today.

That terminates what I have to say. I have it written down and I will give each of you a copy.

JUDGE FULD: Are there any questions to ask our guest?

Thank you very much.

DR. RISNER: You bet.

JUDGE FULD: We can recess for a short period.

(Recess.)

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LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 16, 1976; 3:48 PM

JUDGE FULD: While we are waiting for the copies of the guidelines, Arthur will address us.

MR. LEVINE: We have just passed out a draft of the preliminary report. I would ask you to please look it over and get comments to me by --

JUDGE FULD: By tomorrow?

MR. LEVINE: Well, that would be nice, but how about September 29th? That is two weeks from yesterday. Of course, if you want to get them to us earlier, we would be very pleased to --

This is a draft that errs on the side of too much, I suspect, and we have, for your convenience, made out some large envelopes. If there is anything that you can send back to yourself in the mail rather than carrying back in the plane, the envelopes will be passed out. They are not large enough, but they are large.

Dr. Grosch, I know is only going to be here until 4:30 and I understand that there be additional questions that some of the Commissioners have for him.

DR. GROSCH: I will be glad to do anything I could. I have to fly to Denver, unfortunately. If there is anything, I would be glad to leave, if you want to be private.

MR. LACY: It is illegal for us to be private. Occasionally a cloud.

MR. SARBIN: We are waiting for some papers to come. Is that it?

MR. LEVINE: We are getting some copies of the redrafted guidelines that Gabe and I just did.

MR. PERLE: Let us talk with Dr. Grosch and then I can do that later.

MR. LEVINE: I think we can do that.

DR. GROSCH: Let me come up here again, in case I can do anything.

MR. HERSEY: At the end of our conversation before I thought I heard you saying or moving in the direction of saying that perhaps copyrights should be reserved for works of literature and art and some other form of protection should be devised for these other areas. Is that true? If so, what are the other forms of protection?

DR. GROSCH: It is sort of a moral feeling that I have that there is a difference -- it is not something I have thought about a great deal or that I have any expertise to offer you in; it is just that I sort of feel there is a difference between something that no one else could do, the artistic, the creative sort of thing. It does not have to be a work of art. In that sense, it could be a beautifully written textbook, as I said, or something like that and not something that could be ground out by an organization or by a committee, or a Commission, if I may say so. Or, you know, just requires enough effort.

Now, whether this would be a different phase of a copyright or whether it be an entirely different kind of protection as provided by the copyright, I do not know. We have had this argument. The only reason I have thought about it at all, aside from just being a social human being, is that fact that we have this argument. In the software field there has been a lot of discussion as to whether computer programs are truly creative and, I must say, in most cases I tend to feel that they aren't. You occasionally get one that is just great, some of the original work on computer graphics where you see something thrown up on a screen -- all digitized, you understand, but not appearing that way to a spectator. And the object would rotate and the lines that went around behind would be hidden and the object would get larger and smaller and it would be shown in perspective and color. In a sense, that was artistic, it seems to me. Once he has seen that he goes home and says, "I could do better than that." He writes up a better one. Okay, I can see the element of creativity in the second one, but not nearly as much as the first and then after a while he's selling packages, you know. And they do that by just putting enough people in a room and saying, "Okay. I am going to pay you $8.00 an hour; start writing," in the same way that manuals, operating manuals for gadgets are written.

Yes, please?

MR. NIMMER: You related it in an interesting way before about perhaps going to different views of privacy. It does go to the existing distinction that has long existed -- before new technology between copyright -- in compilations and copyright in literary and artistic works. Many people have questioned whether there should be a copyright in compilations as such; it does not have any authorship or creative aspect. You suggested, as I understood it, insofar as the compilation is a sweat-of-the-brow kind of activity that we are rewarding and with new attitudes on privacy it is that much easier to make the collection or compilation because people are very open about the data being collected and, hence, it perhaps should deserve less of a reward. But then when you get to compilations that may be the combination or collections, not simply the sweat of the brow involved, but itself involves some creative efforts of collection and arrangement. Still, one could argue that does not rise to the same level of creativity as a literary work and, yet, is something more than merely the sweat of the brow. There is some kind of creativity involved. So it is maybe somewhere in between.

DR. GROSCH: I think that is a tough one. I do not have anything to offer on that. I do not think there is any question, from the very, very creative thing, that no one else could do, the epic poem down to the crudest kind of compilation where you just list everybody's license number that you have gotten from the Motor Vehicle Bureau. Somewhere in between is the handsome, well-indexed, conveniently arranged compilation where there still is a very useful element contributed by the compiler and I guess you are simply up against the age-old question of where does the value reside? That is a tough one.

MR. LACY: In general, copyright has avoided the patent law feeling that something had to be original and distinctive. One man's dogma is accessible to another man's epic poem; one man's cigarette ad is another man's painting.

MR. GROSCH: I think I am only justified in pushing any of my ideas on you to the extent that there is a technological element and there is not really much in --

MR. LACY: I would --

DR. GROSCH: Copyright organizations of the Government decided that these goods are original and that they deserve protection and that these are uncreative and unoriginal, unimportant works.

One of the interesting things, it seems to me, is the question of the initial statement. I wonder if it is not possible for a group like this to make recommendations about different qualifications that could be imposed by the copyright holder. In other words, take again the example of this valuable compilation. The compilation where each line has potentially rather high value to somebody. Would it be possible, for instance, to have a restriction which says that in this case no unpaid use whatsoever of the material may be made? I have seen, for instance, a literary work where the thing is red hot; the author has just escaped from Russia or something where you say you cannot quote anything from this; it is really precious.

On the other hand, the copyright notice on the publication says specifically that, you know, other than for the crassest kind of commercial use, go ahead and use it. I wonder if an extension of this isn't possible, not only in the data base case but in the more general case of copyright revision; that the person holding the copyright might specify in more detail how much, what is fair use to him. In producing it, that would be a way of protecting this compilation sort of thing.

MR. NIMMER: Certainly --

DR. GROSCH: Your handsomely compiled thing, for instance, might say it is all right to put this into the data base and use the information in it but do not copy the handsome, esthetic features of it.

MR. NIMMER: One way to approach this input versus printout might be to change the line of fair use for output. Input is not prohibited or not protected, but the output, what is fair use, is a much more limited kind of thing than would originally be under copyright as we have noted up to now. At some point you might run into constitutional objections. Are you then not really, if you are saying you cannot copy one word or two words, you are not really protecting the works of authorship and the means and the running-into-First-Amendment kinds of questions. You are trying to give a monopoly on a fact that someone wants to be able to repeat.

DR. GROSCH: Yes. You can see at least commercial versions of a Watergate sort of thing in that that credit information would be so thoroughly protected that you could not get at it and that would be an unhealthy thing, I am sure.

I think the important thing that I want to come back to about the technology, though, is that if you really do decide you would like to track information through complex technical machinery that at least in the near future and in most cases right now the mechanism for doing so could be available to you. You could tack something on every reel of tape at the beginning that, "You are not supposed to use this without," and you can have in every use of that tape a log which would be added on at the end of the tape, so to speak, listing the uses that have been made, by whom, to what extent, under what authorization, and so forth, all rather inexpensively, if you chose to so recommend.

MS. WILCOX: I think you made reference to a letter you received --

JUDGE FULD: Talk a little louder, Alice.

MS. WILCOX: The letter you made reference to. Would you like to expand?

DR. GROSCH: That was a very interesting little one. I will give you her name. The young lady is authorized to mention this. She offered it to Burroughs, her employer, and they said, "Yes, not for use. Go ahead and tell everything you want."

I will look it up here.

MR. NIMMER: She called me, as a matter of fact.

DR. GROSCH: Is that right? She has an idea that could be put in that goes into a Xerox copier and the Xerox thing is certainly true that the Xerox copier, even a real cheap one, could have that -- would log the use of this and, you know, once a month a meter reader would come around and everyone whose page was copied would get a hundredth of a cent or three-tenths of a cent use out of it. Interesting.

Atkinson, it seems to me to be the name but I will get it to you shortly.

MR. NIMMER: Yes.

DR. GROSCH: Judy Atkinson, Burroughs, Pasadena, Technical Librarian. She thought she might come today, but obviously did not.

I think it may be possible, but I think it is one of those things that may be beyond the limits of reality.

MR. NIMMER: Why? We want to know specifically why, if it is beyond --

DR. GROSCH: I am just thinking of the resistance, the resent. Maybe I am wrong.

MR. NIMMER: You objected aesthetically before.

DR. GROSCH: That, I think, could be licked. You could have infrared. So it makes the cost of the logging device a little more, but not impossible.

MR. LACY: Obviously, it would be no great problem to have the meter show 11,412 copies were done last week or whatever. But there might be a hundred thousand different copyright products. Would this be able to print out the log from that or least to log the copyright proprietary interest at 104 pages?

DR. GROSCH: Yes. What Judy is obviously relying on, we will be able to do this inexpensively and quite quickly. The chip technology would make it possible to keep a hundred thousand records on it on a very small piece of magnetic material or something like that. You are speaking about a gadget that would undoubtedly cost fifty or a hundred bucks. It would not be ten cents, you know, but it would not be ten thousand or twenty thousand.

It would be a fraction of the cost of the entire -- perhaps ten percent, but not 500 percent or anything like that.

As I mentioned in my prepared material there, the cost of further processing will have that capability of sending it off to "ASCAP" and having it erased or recorded and bills issued would not be trivial but they wouldn't be prohibitive. I think the resistance would come primarily from the copier manufacturers and the people that had these installed and that would have to permit access or take their postage meter down to a certain place once a day and that is the type of social resistance. The user would not resist because he would not know anything about it. He gets the copy. Presumably that copy in turn has to have the device on it or otherwise you could just copy it once and then copy the unmarked one.

MR. WEDGEWORTH: But it is not free to the user.

DR. GROSCH: No, it is not.

MR. HERSEY: It is built into his cost of copying.

DR. GROSCH: He will find himself spending five cents a copy instead of four cents and will not know the difference.

MR. LACY: Somebody is going to make a fortune out of that ninety-nine and one-hundredths cent.

DR. GROSCH: It is the old business of scraping a little bit, a tiny bit, off the gold coin every time it goes by and after a while you have gold dust as big as your head.

MR. WEDGEWORTH: We went through this elaborately a year or so ago in a major study that was sponsored by the Society of Research Libraries which was to keep track of all the loan transactions through libraries across the country and it resulted from right here in Los Angeles. Bob Hayes did the study and it is very consistent with what you said. It is technically feasible to do all of that but what gets lost in that conclusion that it is technically feasible is that only a small portion of the costs of collecting, assembling, transmitting the data that you have made technologically possible to collect. That is where your costs are and when we looked at the study, they had to conclude that nobody could afford to do it because the purpose of the study was to assess the feasibility of that national system, accounting for those.

DR. GROSCH: I think it is the old question, again, of looking at the total picture, including the social and personal resistances and the best example of this and one that may be entertaining to you is this business of marking the universal grocery card or whatever they call the bars on the side of the packages. That thing is just not going ahead and they did the hard part of the job, as most people thought very easily, which was to persuade all of the manufacturers to put those codes -- to adopt a code and to have everybody accept it and to print it on the packages. All of that was supposed to be terribly difficult. They did that very easily. Now it turns out the material for the checkout counter is difficult because people are not willing to have individual rubber stamp marks on the tin cans.

MS. KARPATKIN: But those aren't inconsistent. You could also put the prices on the packages.

DR. GROSCH: You can, but then possibly the prices disappear. There is some controversy in the trade.

Let me, however, state as editor of Computer World, that we are having trouble handling this beyond the first few installations.

MR. LEVINE: You might be interested in knowing that one of the major photocopying manufacturers is, in fact, almost at the point of starting an experiment exactly like that.

DR. GROSCH: Is that right? Interesting. I did not know that.

MR. LEVINE: With a bar coding. They have some patent disclosure problems so I am being somewhat vague in my description, but they have a photocopying machine connected to a computer and each transaction would be recorded on computer tape and the computer tape could be removed and sent off, as you suggest, to a clearing house where copyright owners could go through which copyright could be compensated. They expect to experiment with this within the next month or two so it is --

JUDGE FULD: Imminent.

MR. LEVINE: -- very imminent and very feasible and the resistance, at least, is not at this stage with the manufacturer of the equipment. But there are all sorts of problems down the line because the cheap photocopier will probably go away because the machine will have to have something, because every machine, in order to do it feasibly, every machine would undoubtedly have to have one.

DR. GROSCH: Think of the problem that you get now if you want to talk about a systems problem. I am putting aside moral issues and the high technology. Here you have a sheet of paper that is copyrighted. I stick this in the copier and it has the bar code or something on it so the author can get his cash or there just doesn't even have to be a complete breakdown yet. Maybe a class breakdown or something. Stick this in the copier and you get a copy which presumably has the same bar code on it. Otherwise you run into proliferation problems.

On the other hand, here is a letter I wrote today -- or here is an agenda. I put that in. Does the machine lock up because there isn't a bar code on it?

MR. HERSEY: That machine does.

MR. LEVINE: The machine we are familiar with, it would.

DR. GROSCH: You are going to have to copy it.

MR. HERSEY: Not necessarily.

DR. GROSCH: Why didn't I cut my bar code off my first one or place a paper over it and put it in the free machine and go ahead and copy it anyway?

MS. MORRISEY: You can.

DR. GROSCH: You know darn well a lot of people will.

MR. HERSEY: But we have the technology that can devise this sort of thing, so can the technology devise protections against it.

DR. GROSCH: Well said.

MR. WEDGEWORTH: It is not true because the technology is not the problem. It is not the problem at all. Anybody around this table could devise a machine to take care of those kinds of problems, but that is not where the resistance is. We started this discussion several years ago with representatives of publishers and author communities. We said, "Fine. You can design any system that you wish; just do not make us responsible for collecting and transmitting the information."

MR. HERSEY: That is a different question.

MR. WEDGEWORTH: But that is the heart of the dilemma because that is the most difficult part of it. The technology part of the question is the easier part of it.

DR. GROSCH: Let me entertain you again. There is a big flap going on about coding for security, not just for privacy, but for commercial value, for military security, and what have you. There is a suspicion afloat in the trade that the security that has been selected, the level of security that has been selected is just such a whirl that no one except a very large and powerful organization or the National Security Agency or the Internal Revenue Service could break the code. In other words, technology is indeed capable of unlocking any lock the technology locks, but only at great expense. The CIA could afford to, but you and I could not.

MS. WILCOX: It seems to me, too, that if you are trying to catch the violators, what you really need to do is attach a lie detector or something to the individual when he goes to the machine and uses it, because then you could really catch him and until you do that --

MS. KARPATKIN: Sweaty palms lights the machine.

DR. GROSCH: That is possible, too.

(Laughter.)

DR. GROSCH: We are going to have probable fingerprint identification reading devices working pretty well within a few years. SRI and the National Laboratory in England have you sign your name on a goody four or five times and a green light goes on and says your average signature is recorded; and the next time you sign it it says, "Okay, that is him." Fingerprinters are going to look at the little tiny details of the fingerprint and classify them, and when they do that, then a single print will not be enough. You always must have a full hand rather than a single print. You can prove it if you leave a print on the murder weapon and then you catch a guy and you compare his thumb with the clue and tell that it is him, but you cannot go down to the FBI with one thumbprint and say, "Who is this?" It takes all ten.

MS. KARPATKIN: I did not know that.

MR. MILLER: You have been watching too much television.

MR. LEVINE: I have been so careful.

DR. GROSCH: Times ten, it is enough. And they have a classification scheme worked out to search through the files. Now what we are going to try to do is look at each little bifurcation and loop in a numerical code and search that in very much more complex computing schemes and they ought to be able to identify single prints, so you might watch it on the Xerox machine before using it first. I hope that does not happen.

MR. LACY: It is all right to use the machine, but what about the traffic warrant?

(Laughter.)

DR. GROSCH: That is exactly what we are all afraid of.

MR. NIMMER: Aren't there methods of avoiding self-incrimination and fingerprinting and all the rest? Doesn't it perhaps turn on the motivation to cheat? If we are talking about libraries or supervised machines and if the consumer is going to pay the copyright royalty, the librarian has no motivation to cheat. At least there is nonprofit. Then it seems to me you do not need a lock on the machine. That is, you trust the librarians to not cover up the insignia if it is copyrighted and if it is not, the machine will register "No fee due."

On the other hand, the problem arises where you have unsupervised machines, it seems to me, but then the answer might be, I ask tentatively, a copyright fee, a fraction of a cent, or whatever it is, on all reproductions whether copyrighted or not. But then the fund only pays for the copyrighted work.

DR. GROSCH: Yes. That thought did occur to me, that we might simply have an overall fund that all copying gets dumped into and then chop it up among them.

MR. NIMMER: For the person who does not want to pay a copying fee for his uncopyrighted reproduction, then he goes to a supervised machine and there is a variation.

DR. GROSCH: Suppose that the supervised machine is used to produce statistics and indications of how much each author or each copyright holder is copied and then you have a gross amount collected from unsupervised machines? It gets dumped into the same pot -- and I am just thinking out loud, you understand.

MR. MILLER: It is an interesting discussion, but obviously our function in talking to Congress is not to build them a better mousetrap, whether it is a technological mousetrap or it is a spring-gun. It is perfectly clear that no system is going to be perfect; perfectly clear. So what we really should be asking ourselves is is there a police mechanism, an enforcement mechanism that has reasonable accuracy in the 90 to 95 percent range of picking up all -- let us call them compensable uses for the time being. Is that system sufficiently foolproof so that violations of it would not reduce the 90 to 95 percent pickup to something like two percent enforcement, because the gap will be replaced. Now I would think that when you are talking about the copyright fee that would be charged for Xeroxing this one sheet of paper given the billions of pages that are Xeroxed, the copyright fee will be so infinitesimal that there will be zero incentive even to go to get out a pair of scissors to cut off the bar. And the ramifications of violation for installation users will be so significant, both in a moral, ethical, and in a legal sense, that your major institutions are not going to engage in it. Your slug on the street will not even know how to do it and for your hobby group who may attempt to, one-tenth of one-tenth of one percent of the population, they have enough sense to know it is not cost-effective to block out the bar.

DR. GROSCH: They may do it anyhow.

MR. MILLER: It will not make a bit of difference, really. The next question is, even if you can devise a technological system that is 90 percent effective, that is not vulnerable to fail-safe to any degree, is whether the system will have such heavy transaction costs so that you are paying a buck to pick up the penny, at which point you have gotto think about bar coding, that it is cost-effective. Translation costs or illustrative costs on a machine, as you have just been talking about, is so significantly cheaper in a transaction cost sense so that even though it is less precise it is still socially more desirable. No one sits around and writes down how many copyrighted pieces of music that are played. There is a probabilistic analysis of what is going on and that is good enough. As long as the overall revenue makes the troops happy. Once you have gone through that sort of a discussion in your own head you have to go back to something that Dan Lacy was talking about during your initial presentation. That is, if you have got that sort of a back-up capacity that is going to make certain uses or all uses inside a computer system compensable, have you not now defeated the argument that says the copyrightable point is input into the system? It seems to me that is one of the major philosophical questions that this Commission really must address itself to; looking at several strategies, one of which says you have got technological backup in terms of making uses compensable at the output side. What now is left to the argument with regard to input and the implication that making input a copyrightable event has, on a wide variety of uses, we would all agree a fair use.

Now, you go back into putting Encyclopedia Brittanica into a library. You pay 500 bucks; you put it up on the shelves and over a time, a theoretically infinite number of people can go to the Encyclopedia and say, "Charlemagne was born in the year" -- I forget the year -- as opposed to putting it into the Los Angeles Public Library computer or UCLA's computer and making it available on that system, to again an infinite number of people, the concern being that fewer people will go to the higher level than will go to the computer system; or if it is a library system they will buy 30 $500 books rather than one Brittanica and input it, make it available through access terminals and 30 branches of the library. If you have got this backup system and you shift your concept of compensable event from major hard copy printout, that is the classic notion of infringement of a book, the compensable use of the data base; namely, the Brittanica in machine-readable form and say, "If you want to know when Charlemagne died through this terminal, it is going to cost you one one-hundredths of a penny," then you have got no argument, or reduced significance to the argument that it is input that caused the copyright toll.

MR. LACY: I do not agree with that. The agreement at the point of input might well be that it would be one-hundredth of a cent use or 50 cents a use or $1.00 a use, or a quarter a use, depending on the value.

But let us suppose there was a company, for example, that put out a citator that listed all decisions subsequent to a case and this is a very valuable commodity and people pay a great deal for this information and somebody wanted to put that in a data base so it could be accessed on line and they have no right to do this and you say, "You cannot do that." Who determines, then, what the output charge is? The agreement that was made at the point of output might be that the tollable thing was going to be output and as technology would measure it, but somewhere the right to agree or disagree --

DR. GROSCH: Surely this is just the equivalent of setting the price of a printed copyrighted work; that you have the right to say that the encyclopedia sells for 500 bucks a copy because you remember how much it cost you to build it.

On the other hand, you can sell a cruder child's encyclopedia for a great deal less; each of them protected by --

MR. NIMMER: In your case, Dan, the laws could say, "Upon the printout of one citation there is nothing due for feeding this Shepard's citation into" --

MR. LACY: I did not say anything about Shepard.

MR. NIMMER: Or whatever. But any printout of one citation is an infringement unless it has been consented to which in turn means unless the price --

MR. LACY: Nobody sends X-hundred dollars unless they have made the agreement.

DR. GROSCH: Which you are going to see, you will be able to buy a tape also or some kind of machine and it will undoubtedly cost a lot more than a printed set.

MR. MILLER: But it will probably cost a lot less than for an individual library to punch it in themselves.

DR. GROSCH: Exactly so. That will be a marketing device.

MR. MILLER: Let me back up and articulate the philosophical point that Bob has made. Dan knows what it is; we went through this in 1967. The philosophical point Bob was making with making input an infringeable event, two concerns:

First, if you say you cannot input without consent, then you are potentially creating a barrier to the utilization by a new technology. I am just stating it. This is a dire conclusion.

Second, if you are making input an event that requires compensation, then you are requiring everybody to pay money when some subset of those inputtings will be inputting for a use that has historically been thought to be non-infringing for use, non-compensable.

MR. PERLE: You made some statements there.

MR. MILLER: I know. I understand, Gabe. I trust people understand what I am doing. I am trying to focus some discussion on some issues that we have.

MR. PERLE: I think you made one false assumption. Traditionally, you buy a book and, here you get your book for nothing if you have free input.

MR. MILLER: Do I buy the book to input it just as I bought the book to put it on the library shelf?

MR. PERLE: Then you are buying the tape. That is equivalent to payment for input.

MR. MILLER: I buy a book; I can either sit and read it and memorize it or I can put it into my machine.

MR. PERLE: You have not bought the tape; you bought the book.

MR. MILLER: I bought the book in both cases.

MR. PERLE: I do not know that --

MR. LACY: What keeps you from borrowing it from the library? I do not see the ownership on which print evolves has any right to input it into a machine.

MR. MILLER: Before you were playing with a very sympathetic hypothetical from your proprietary, from the proprietary; namely, you slipped the Brittanica in there and, my God, the entire population can research it for one lousy $500 purchase.

Let us play with my hypothetical. You are an academic, God help you. You want to close your ears, John? You are not going to like this.

You want to know, unfortunately, what a lot of academics do, syntactically or quantitation. They plug one of John's novels -- let us make it all his novels in, and they want to do sentence structure analysis. They want to do key therapy.

DR. GROSCH: Which would prove he did not really write it, in fact.

MR. MILLER: Whatever. Classically, that academician could go to the library, pull down the book, and read the book and do all the syntactical analyses manually and we know that is fair use. No one would say you are infringing.

Now, the university has a big computer so he plugs the book in and through some software package he does the same syntactical analysis by computer. Should that be affected by the Copyright Laws?

MR. LACY: If he erases it when he gets through with the tape, there is --

MR. MILLER: But if the machine could control the possibility of any subsequent use, not within the ambit of the initial fair use, then the security problem is solved.

MR. LACY: I mean, the point is, I would agree the input has been made a fair use because it was a fair use of the work, but that does not mean that, absent the fairness, the input would not have been an infringement.

MR. MILLER: So we are talking about one --

MR. LACY: Input is certainly subject to fair use. But to input it, leave the tape on the library shelf, is certainly an infringement. I agree the agreement would be greatly fortified if you did not say that little bits and pieces of output are also protected, but when you say input of the total work is protected and output of the bits and pieces is protected, it is a disingenuous argument.

MR. NIMMER: You are saying you cannot have both or it is not justified to have both, but suppose they do have the protection of the printout; you still even have a minimal kind of printout, the year Charlemagne was born, et cetera.

MR. LACY: Then the question becomes academic because nobody in his right mind would make an input. Isn't it conceivable if somebody sends me a work I could go ahead and set the whole thing in type without his permission as long as I did not print a single copy of it, but it just does not go --

MR. NIMMER: We are really talking about in making a contract between the owner of the Encyclopedia Brittanica and the computer user, should that contract be geared to the act of input or should it be geared to the act of printout? It is just a question of which one makes more sense in terms of a useful way to pay for it.

MR. MILLER: Dan does sort of do the Solomonic thing by saying that -- I think he has backed off an inch or so. I think what he is now saying is he would recognize that certain inputs are for fair use.

MR. LACY: In point of fact, I was just about to make the same example that you did before only I was going to --

MR. MILLER: That makes the decision as to whether the input is compensable or not the intent of the inputter with regard to the expectation as to the output.

MR. LACY: I think it gives them a defense. I think the law would be presumed infringement. If I sued him, he could offer as a defense that he used it only for this one purpose and had erased it.

MR. MILLER: Whether the regime of distinguishing between and among different inputs with regard to the nature of the utilization of the work, whether that is not too difficult to administer --

MR. LACY: Isn't it far more difficult to put the burden upon the proprietor?

MR. MILLER: I do not think that is. I could, for example, see that every input is compensable as long as you developed a rate structure.

MR. LACY: But just with permission.

MR. MILLER: Well, the permission is both because of the access difficulty. You have to worry about the viscosity of the system; your ability to plug them in when you need them, not when an exchange of correspondence happens to get handled.

MR. LACY: Plus a certain amount of fair use. Nobody figures that he has got to sit down and write for all the permissions that he does on things that are printed, we know.

MR. PERLE: You also presuppose there that the social value of access is more important than the need to compensate the author, if you will.

MR. MILLER: I presupposed that, Gabe? Me?

MR. WEDGEWORTH: Is there any question about that?

MR. MILLER: It is a debatable point, I will admit. Lurking under that is the compulsary license.

DR. GROSCH: You are going to have technological aids, however. One is, of course, the fact that most books and journal articles are going to be produced in machine-readable form very soon. There will be a mag tape or something in the system ready for chief input. Another one is the reasonable introduction of optical character reading and other keypunch elimination things. We were thinking seriously at the Bureau of Standards even as far back as six or eight years ago, about particularly reading all the chemical patents, for instance, because we got to the patent literature-type phase and they did not have a lot of diagrams. Most of their stuff was just fiddle-faddle and we were very seriously thinking that we could put the patent into a machine six or eight years ago. They have not done it yet, but that is the Government.

MR. LACY: Practically a great bulk of publishing very soon will be, I am --

MR. MILLER: Isn't it possible that the input question is a transitory question to the extent that all books --

MR. LACY: I have never heard of anybody who really had a problem with that.

MR. MILLER: If they are right, as we all know that Linotypes are going to be driven by machine-readable tape so that it is commercially possible to vend the tapes at a price lower than input costs for a third person, no one has the incentive to input without permission.

MR. LACY: I do not think --

DR. GROSCH: I like to think of the good side of the future; mind you, there are also bad sides. I like to think of the good side of the future that is very much like science-fiction-games machines in which essentially all the information in the society is linked together in a network. Hopefully, there would also be an automatic safeguard so only appropriate people could get authorized information out of it, but if that were so, you really would have access to virtually every fact in society, entire data bases through mechanical means. The alternatives would still exist. You would still have handsomely printed books; you would still have things you could read on airplanes or take to bed at night, but in addition you would have the machine way to every fact in the society. I am inclined to think this will come, also. It will not come in this century, though, certainly. So what you are really talking about is a way of short term that revolves around print and involves different ways of recording things, but looking far down the road to a time in which everything will be machine-available, inexpensively machine-available. And that, I think, you might very well think of what you do in the future in such a way as not to require an overturn when you go into the more distant future and I think I would say, you know, without trying to force it on you, that the control of output is a more practical way of doing that. Ultimately have to have control output.

Listen, I do have to go.

JUDGE FULD: Thank you and if I could say, as we get further advanced, we would like to feel free to ask you to attend again.

DR. GROSCH: It is cheap to come to Los Angeles; if you want me to come to Washington, you have to buy me an airplane ticket.

JUDGE FULD: We will do that.

MS. KARPATKIN: Did we ask him?

MR. LEVINE: We asked him.

MS. KARPATKIN: Shouldn't we pay for his plane fare?

MR. LEVINE: If it is something --

MR. WEDGEWORTH: What was your intent when you invited him?

MR. LEVINE: Our intent was, I guess, educational. I am not sure. I have to talk to Mike. I assume from his last comment that we were not compensating him for this.

JUDGE FULD: Are we going to take this up now?

MR. HERSEY: It does not show changes.

MR. LEVINE: No, it does not because it was just not feasible. We can, perhaps --

MR. NIMMER: Because you could dictate.

JUDGE FULD: Read it out loud as we go along.

MR. LEVINE: I can tell you, I think, precisely where the changes are. The first paragraph is the same as the first paragraph in the introduction.

The second paragraph we have eliminated the word "correct" in the last sentence so that the Commission merely considers the guidelines to be a workable and fair interpretation.

The third paragraph represents fairly substantial change. It begins originally on the bottom of Page 3; it continues to the first line on Page 4 and then the rest of that paragraph is new, beginning with the words "those published."

MR. HERSEY: I am lost there. Would you repeat that, please?

MR. LEVINE: I am sorry. On the bottom of Page 3 of the old draft.

MR. HERSEY: The adverb is left out of that first line; right?

MR. LEVINE: Yes. The adverb is left out.

MR. HERSEY: Then?

MR. LEVINE: Then the first line on Page 4 is included to the end and the rest of Page 4 is not included; it is eliminated.

JUDGE FULD: After the --

MR. LEVINE: After the dash in the third paragraph is all new "those published within five years prior to the date of the request," through the end of that paragraph.

We then go to the --

MR. HERSEY: Wait a minute, now. This is all new material we did not discuss this morning.

MR. NIMMER: It is putting in language that we did discuss.

MR. LEVINE: I will just try to point out the differences and then we can come back to the differences.

The last paragraph in the new draft is the same as the changes that we made to the last paragraph in the old draft.

MR. NIMMER: In the last paragraph are you talking about, on Point 2?

MR. LEVINE: Yes. "The point has been made that the present system," and that conforms with what we discussed this morning and which there was, I think, complete agreement.

We felt that if we were leaving in anything that talked about what copying could be done within five years, that we had to say what the position was as to copies after five years. In fact, we used short language. We have said, "The guidelines do not specify what aggregate quantity of copies of an article or articles published in periodicals, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to Section 108(g)(2) in such case is left to further interpretation by future guidelines, legislative action, or judicial decision."

MR. NIMMER: Good, I think.

MR. FRASE: What do you mean by "future guidelines"?

MR. WEDGEWORTH: That was the part I thought we discussed at length and we had agreed that we were not going to telegraph decisions of that type.

MR. PERLE: This is in the introduction. When you get to the guidelines, you will not see it in the guidelines itself. This is by way of explanation of the guidelines.

MR. FRASE: My question is, what are the guidelines?

MR. PERLE: Wait until you get to the guidelines and I think we can discuss it as a whole. What the guidelines are are an attempt -- and we hope a successful attempt -- to deal with a problem that has been a terrible obstruction.

MR. FRASE: Given some life and meaning by being put, say, at that -- "enacted by the Congress but after the revision bill is over," then what does the term "guidelines" mean?

MR. LEVINE: There could always be guidelines and agreement.

MR. FRASE: Private agreement between parties?

MR. LEVINE: There was something back in the Thirties called the Gentlemen's Agreement on photocopying.

MR. PERLE: What are the guidelines of classroom using?

MR. FRASE: Those are endorsed by the Congress.

MR. PERLE: This will be, too.

MR. FRASE: But future ones?

MS. WILCOX: Future?

MR. PERLE: Further interpretation, whether by guidelines or legislative agency or judicial decision.

MR. NIMMER: Whether by informally agreed upon guidelines --

MR. PERLE: Or otherwise. "Left to further interpretation." Make it "future interpretation." "To future interpretation," comma, "whether by formal or informal guidelines, legislative agency, judicial decision, or otherwise."

MR. HERSEY: What is the value of "formal or informal"?

MR. NIMMER: What we mean is nongovernmental agreed upon --

MR. PERLE: We will talk about the Gentlemen's Agreement as opposed to classroom photocopying.

MR. WEDGEWORTH: It has no status in this case unless it is accepted by Congress, so what you are really talking about is additional guidelines rather than "formal or informal." It is something other than what is presented here.

MR. LEVINE: Excuse me --

MR. PERLE: I was under the impression that it was necessary in order to make sure that after five years these guidelines do not apply.

MR. WEDGEWORTH: I thought that is what the previous sentence said.

MR. HERSEY: What is the meaning with ending the sentence at "interpretation"?

MR. LEVINE: Fine. Let me just suggest that the guidelines themselves anticipate some further reviewing and revision in the last paragraph, paragraph No. 5 in the guidelines. All the parties agree that there should be review and presumably if there is review there is some action that will be taken as a result of that review, and I would think that might be future guidelines.

MR. PERLE: I guess we will leave it "in such case is left to future interpretation," period. Okay?

MR. WEDGEWORTH: That would be fine with me.

MR. PERLE: Sure it is okay?

MR. WEDGEWORTH: You are changing the word now from "further" to "future interpretation"?

MR. PERLE: Yes. We are doing nothing about it right now.

MR. LACY: You are not interpreting it either now or in the future; it is left to interpretation.

MR. PERLE: I cannot look in the minds of people who are going to be carping, if you will excuse the expression.

MR. WEDGEWORTH: I do not want to belabor this point, but I thought that the point that I made this morning was that we could simply say that they do not cover those other cases and point back to the language itself, rather than trying to tell people. Maybe when we get over to the guidelines themselves we can come back to this.

MR. LEVINE: Why don't I read 1(a) of the guidelines and you can compare it as I read it slowly with what went before, because I think it is too difficult to explain how it has been changed.

> "As used in the proviso of Subsection 108(g)(2), the words 'such aggregate quantities as to substitute for a subscription to or purchase of such work'" shall mean:
>
> "(a) With respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a 'requesting entity') within any calendar year for a total of six or more copies of an article or articles published" --

MR. PERLE: Something has been left out.

MR. LEVINE: No. "Published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies in any issue of the periodical, the publication date of which is more than five years prior to the date when the request is made."

MR. PERLE: That is wrong. That is wrong.

MS. DOUGHERTY: "These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical."

MR. PERLE: "Copy or copies of an article or articles."

MR. WEDGEWORTH: Where are we?

MR. PERLE: On the twelfth line.

MR. LACY: Here you are, John.

MR. HERSEY: Thank you.

MR. PERLE: You must insert after "copy or copies," the words, "of an article or articles published."

MS. DOUGHERTY: "In any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request of '...such aggregate quantities as to substitute for subscription to [such periodical].'"

MS. WILCOX: What words do we add in there?

MR. PERLE: "Of an article or articles published." And the word "a" is to come before "subscription."

MR. LEVINE: "For a subscription."

MR. PERLE: It is redundant but it clears up any ambiguity.

MR. LEVINE: If you have taken any post-graduate law degree, the whole thing is prolix, that is for sure.

This is (b):

"With respect to any other material

described in Subsection 108(d), (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright, subject to the following terms and conditions:

"2. In the event that a requesting entity shall have in force, or shall have entered an order for" --

MR. PERLE: That is new, "or shall have entered an order for."

MR. LEVINE: -- "a subscription to a periodical or has within its collection a copy or phonorecord of any other copyrighted work, a copy of which it desires to obtain from another library or archives (the 'supplying entity') and the material to be copied is not reasonably available for copying by the requesting entity itself, the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection; provided that a library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of Section 108, to supply such copy from materials in its own collection."

MR. LACY: We really should strike "is not reasonably available for copying by the requesting entity itself," because what I think was originally meant was it was reasonably available for copying by the requesting entity. The way I read it now, if the thing is reasonably available for copying, then these restrictions no longer apply. You can copy even if it is illegal under 108, if you have got it reasonably available for copying. It is a reversal of what you really mean. That ought to be left out.

MR. PERLE: You are going to invoke the wrath of the publishers, Dan.

MR. LACY: The publishers would be wrathed if it was in there. Read it. What it says is that if the material is reasonably available for copying then the subsequent limitations do not apply.

MR. PERLE: It was intended that if the material is reasonably available from your own collection, do not get it from somebody else.

MR. LACY: Two different ideas got involved in there. One idea was that if it was reasonably available for copying you did not get any copy from anybody else at all; you copied your own copy. But if it was not reasonably available, then you could go ahead and get it from anybody else, something you could not have done if it had been reasonably available.

MR. NIMMER: Isn't that what it says?

MR. LACY: No. What it says, if it is not reasonably available, you can get no more than you could have done if it was your own; but presumably if it is reasonably available then you can get anything you want from the other library, which is not what you mean. That is this limitation.

MR. NIMMER: That is all before the semicolon, Dan. Before the semicolon is not the reasonably available part. It indicates to the circumstances under which you can get it from somebody else, even though you have a copy yourself. That is only when your copy is not reasonably available.

MR. LACY: The material to be copied is reasonably available; then you do not have to treat it as a fulfillment of a request from your own collection. The rest of 108 is not available.

MR. PERLE: I do not follow you.

JUDGE FULD: What would you insert?

MR. WEDGEWORTH: I think I understand. You have got two ideas mixed up here and the source of it is the last line under 2, "or has within its collection a copy or phono record of any other copyrighted work, a copy of which it desires." You start out talking about something that you presumably do not have, but you have subscribed to or entered a subscription --

MR. LACY: What you are trying to say, I think, is what Irwin was trying to say.

MR. HERSEY: That was not his idea.

MR. LACY: Whose?

MR. HERSEY: It was in our original guidelines.

MR. LACY: If you have it and it is reasonably available for copying, you do not make any copy from any other library at all. If you own a copy or subscribe to it and it is not reasonably available, then you can get it from other libraries, but only to the extent you could have if you had --

MR. HERSEY: That is the intent of this language.

MR. LACY: Right. But that is not what this language is.

MR. HERSEY: If you put a comma after "periodical" in the last line of the first page, then there is a new category. That is, you have a copy but the copy is not reasonably available.

MR. LACY: Suppose it is reasonably available? Then what is the situation?

MR. HERSEY: Then you are not allowed to copy it.

MR. LACY: It does not say you cannot copy it if it is reasonably available. All it says is if it is not reasonably available --

MR. HERSEY: Both conditions have to be.

MR. WEDGEWORTH: Why shouldn't you be allowed to copy it if it is available?

MR. HERSEY: You can copy in-house, but you cannot borrow from another library.

MR. LEVINE: You can borrow from another library and make only as many copies as you could if you were doing it in-house.

MR. WEDGEWORTH: I do not think that makes any difference and I am sure we never intended to imply that. If an employer owns a copy, suppose it does not have a copying machine and sends it off across town to get a copy from somebody else; what difference does it make?

MR. HERSEY: I believe this condition was put in for the librarians because the argument was made you may have a subscription but you cannot -- you may have a copy of the book with pages missing.

MR. LACY: The librarians mentioned this as one of the kinds of explanations of why they would need the copy in another library, even though they owned the book, whether it was lost or damaged or got out of circulation or the copying machine was broken down. But I do not think that was meant to be a condition.

MR. HERSEY: This is not new. This was in the guidelines that Gabe drew up after our June meeting and it has never been a question up to this point by anybody.

MR. WEDGEWORTH: I think it says what we generally thought it said and we have never really talked about the alternative explanation that you have given.

MR. LACY: I am saying the fulfillment of such a request being treated as though the requesting entity made such a copy from its own collection, which inputs all the restrictions of 108 into this, only becomes operative if the copy is not reasonably available.

MR. WEDGEWORTH: That is right.

MR. LACY: What I am trying to say, it seems to me that the fulfillment of the request ought to be treated as though it were from its own collection, whether you have a copy or not, and ought to be subject to the same restrictions. Why wouldn't the restrictions on copying from your own collection be applicable to a copy you got from somebody else, even though your copy was available for copying?

MR. LEVINE: It seems you could eliminate the line "and the material to be copied is not reasonably available for copying by the requesting entity itself." Or supposing, does it help it if we put a period after "a collection," and eliminate "provided that," and start a new sentence with "library or archives may request such a copy or phonorecord"?

MR. LACY: If you are meaning to say that a library that has subscribed to a periodical can get a copy from another library only if its copy is not reasonably available; is that what you mean?

JUDGE FULD: That is how I read it.

MR. HERSEY: Dan, what did you substitute for before "and the material"? If you have your earlier guidelines in front of you, in the material that we have eliminated on Page 4, there is a restatement of this thing, which uses the --

MR. WEDGEWORTH: Page 4 in the guidelines?

MR. HERSEY: Yes. Subsection 2, at the top of that page. There is a restatement of this.

MR. LACY: What is intended to be the case if the library has a copy which is conveniently available for copying? Are you intending to say it may not require or ask for a copy from another library?

MR. PERLE: No.

MR. LACY: What do you mean to say, assuming it is available?

MR. PERLE: Only to the extent and the same way that you can do it yourself.

MR. LACY: Isn't that exactly what you are saying, if it is not available for copying? You are setting up two different situations: one is, you have got a copy for copying; and another is, if it is not available.

MS. WILCOX: I think it is further confused because you have added in there "or shall have entered an order for," because that does not cover -- that is another condition. That is added into this because what you are talking about, obviously, you cannot have something lost that you just placed an order for or missing or not reasonably available.

MR. LEVINE: That is right.

MR. PERLE: If the truth be known, I suppose then 2 could start with the semicolon.

MR. LACY: It does not help the librarians. It is quite the other way around. It says all these limitations we are trying to put --

MR. PERLE: You could strike the whole thing and start the whole thing with the "provided that." Strike "provided that," and say "a library or archives may request a copy." Right?

Start Paragraph 2 with the fifth line from the bottom on Page 2 of Paragraph 2 with the words "a library or archives."

MR. LACY: I am sorry. Where?

MR. PERLE: If you forget everything that goes before it. All you have to say --

MR. LACY: Where are you now?

MR. PERLE: On Page 2. Forget everything that goes before that and start the whole paragraph with "a library or archives may request a copy or phonorecord from a supplying entity only under those circumstances," and forget everything that goes before it. Strike everything else.

MR. LACY: Good.

MR. LEVINE: What do you mean by "everything else"?

MR. PERLE: All of 2.

MR. LEVINE: What is the point of (a) then? Why the five-copy restriction?

MR. NIMMER: Isn't the beginning of 2 removing the five-copy restriction?

MR. LACY: No. You cannot.

MS. WILCOX: Yes, it is.

MR. NIMMER: Where you have the subscription and now you are eliminating the removal.

MR. LACY: Up to then you have two different -- what I thought we were trying to get, two different cases. It does not have; has not owned; has not ordered anything. Under that condition it can order up to five copies, but no more.

Clause 2 applies when it owns or has ordered the publication in which case it can order whatever it could have if it were reproducing it from its own copy. Now, whether or not a copy is conveniently available seems to me to have no relevancy.

MR. PERLE: Taking it back, the reason we have it phrased this way is because we are interpreting the meaning of the words "substitute for a subscription or copy." So what happens if you happen to have it in your collection? The inter-library loan transaction applies only to inter-library loans. You cannot have an inter-library loan for a copy which is substituted for a purchase or a subscription. "But, fellows, I already have one. So what do I do now?" What I do now is I say, "Okay. I can do the same thing on an intra-library basis that I could have done myself."

MR. LACY: I am saying the conveniently available --

MR. PERLE: Should not be affected.

MR. LACY: Reasonably available could have got in before we said this business. You cannot do anything with an intra-library loan that you could not do if it were in the collection before. Before that was introduced there was a concept you could not, if you had the publication. But the way it is drafted now, it sets up three situations: A, you do not own the book and have not subscribed, five copies; B, you own it but it is not conveniently available, in which case Section 108 governs; and you have a Class C, you own it and it is conveniently available and nobody says what the limitation is.

MR. NIMMER: Then it is back to the five copies.

MR. PERLE: If your copy was reasonably available.

MS. WILCOX: I cannot imagine anybody wanting to do this because the economics of it do not make sense.

MR. NIMMER: But the structure is 2 replaces 1(a). 1(a) has the five-copy restriction. 2 is a substitute for the five-copy restriction only if you have a subscription and it is not reasonably available.

MR. LACY: This whole thing you are trying to put in saying you have to comply with 108, you have triggered only with the unavailability. It is exactly the opposite.

MR. HERSEY: I think if we leave out about the material phrase, as Dan is urging, it is still all right. That really describes the borrowing libraries motive for wanting a copy.

MR. PERLE: You want to take out "and the material"?

MR. HERSEY: What happens then? Is that all right, then?

MR. PERLE: Irwin and Charles said it has got to go back in.

MR. LACY: Has no copies available from anywhere else and you have not said that either, if that is what you mean.

MR. PERLE: I am perfectly willing to take it out.

MR. LACY: What you are saying now is none of these other limitations that you are putting in operate.

MR. PERLE: I think it is meaningless.

MR. LACY: I agree with you.

MR. LEVINE: One point that Gabe has been making that becomes more apparent now is that the numbering is wrong. The top of the page should not be No. 1. There should be an A and 1 should be where 2 is because that is a --

MR. PERLE: Modification.

MR. LEVINE: -- modification. Thank you.

MR. PERLE: 1(a) and (b), the overall guidelines say everything in it. This is a dangling participle.

MS. WILCOX: Are you saying that if you have a subscription it also is counted in the five copies?

MR. PERLE: No.

MS. WILCOX: Then does this become (c) or are you saying this is not 2 any more?

MR. PERLE: 1 should not be 1. The guidelines are all (a) and (b). The following terms and conditions are all modifications on it, so that 2 would go back to 1; there would not be a 1 where 1 is now.

MR. NIMMER: Wait a minute. Isn't 2 a situation where the guideline of five does not apply? It is an alternative.

MR. PERLE: No, it is not. Five still applies.

MR. NIMMER: The five does not apply if you make your own copying right from your -- if you do not go inter-library. Now 2 is saying an inter-library loan, where you have your own subscription, will be treated as if it were not, so the five does not apply to whatever you could do for yourself.

MR. LEVINE: That is right.

MR. PERLE: That is right.

MR. NIMMER: So 2 is an alternative to (a) and it is separate.

Furthermore, in answer to Dan's point, what happens if it is reasonably available is that the alternative does not apply, which means you are back to the five limitation. Maybe you want that; maybe you do not. But it does not leave it hanging; there is an alternative. There is either the five limitation or inter-library, if it is not reasonably available.

MR. PERLE: So we have to strike "any material that is not available."

MR. LEVINE: Not necessarily.

JUDGE FULD: I think it belongs in.

MR. NIMMER: If that is the deal.

MR. WEDGEWORTH: It does not make sense if you delete it. Then it is not an alternative to what you presented before.

MR. LEVINE: So we leave it in.

JUDGE FULD: This is what we intended, the way it is written.

MR. LEVINE: I am going to do an in-depth study on syntax.

MR. HERSEY: Where are we?

MR. LEVINE: Now we are on 3. 3 now reads simply -- if I may use that word --

"No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines."

Okay?

4 and 5 remain exactly the same as they are in the original draft.

MR. WEDGEWORTH: So the only --

JUDGE FULD: Dan, I read 2 as reflecting what we intended. Do you still feel it is incorrect?

MR. LACY: You mean as it was without change?

JUDGE FULD: 2.

MR. LACY: I think it is muddy draftmanship, but I do not think it will do any great harm as long as people do not think that that phrase about "not reasonably available," as long as it is meaningless, it is all right. If you think it means something, then I do not think we know what it means and it could mean --

JUDGE FULD: I think it applies only if it is not available. And we go back, as we said.

MR. LACY: You should suggest two alternatives: one, set a criteria if it is reasonably available for copying; another set of criteria applies if it is not available. If you say what applies if it is not; if you do not say what applies if it is available, then you just leave --

JUDGE FULD: Then one becomes permissible.

MR. NIMMER: 1(a) applies unless 2 stops 1 from applying. If 2 is not, then 1 necessarily applies.

JUDGE FULD: 1 applies unless 2 is met.

MR. LACY: No. Because we will --

MR. WEDGEWORTH: Would it be helpful if instead of just straight numbering, if you indicated in the margin, because 2 cannot apply at the same time.

JUDGE FULD: I do not follow what you mean. I do not understand.

MR. WEDGEWORTH: You have got the guideline which is given in 1, but you have got another situation, which you are trying to describe in 2.

MR. HERSEY: So you have another guideline.

MR. WEDGEWORTH: The 2 cannot apply at the same time, so if you had "or, 2, in the event that a requesting entity shall have in force a subscription of or have entered an order for or has within its collection," et cetera.

JUDGE FULD: That seems clearer to you?

MS. WILCOX: That is what we had in the other one, where it said that one of these items has to apply. But we have left this out and this does not make sense.

MR. NIMMER: It does make sense in the sense that 1 starts with a reference of the proviso of 108(g)(2); now you get to 2 and you are saying in those circumstances of 2 it is not going to be treated as interplay; it is going to be treated --

MR. WEDGEWORTH: Then no --

MR. NIMMER: Even though it is inter-library; right?

MR. HERSEY: I think these are two guidelines. I do not see why they cannot be "1" and "2." In fact, I would be in favor of "subject to the following terms and conditions."

MR. WEDGEWORTH: I think that is misleading. That is misleading, the last line in 1.

JUDGE FULD: I think that can come out.

MR. PERLE: All right. What would happen if you eliminated all numbers?

MR. HERSEY: All what?

MR. PERLE: All numbers. Start a paragraph with (a) and (b) under it.

JUDGE FULD: I think you want to keep numbers.

MR. PERLE: I do, too.

MR. NIMMER: But "subject to the following terms and conditions"should come out.

MR. MILLER: I do, too. I think this document should be input into a computer and the computer be instructed to randomly spray the words on a piece of paper and the result would be better than this.

MR. PERLE: Thank you.

JUDGE FULD: I think it reads --

MR. LEVINE: That is exactly how we did it.

MR. MILLER: I am treating myself as the average lay person coming to this document fresh and it gives me a headache. It really does.

MS. KARPATKIN: It is not public interest that keeps us from doing it.

MR. LEVINE: Is it workable and fair?

JUDGE FULD: It seems clear to me.

MR. FRASE: How about this: Subheadings at the committee when the library holds the work and then, secondly, where the library does not hold the work.

MR. WEDGEWORTH: I think anything else would make it worse.

JUDGE FULD: Take out the "subject to the following terms and conditions."

MR. MILLER: Can I ask someone to tell me what situation 2 is covering? I think I am going back to Dan's point. Is it describing two different situations or three different situations? It says in the event that a requesting entity, 1, "shall have in force a subscription," or 2, "shall have entered an order for." Are those the two situations?

MR. HERSEY: No.

MR. MILLER: Or are the two situations, 1, "shall have in force a subscription but the material to be copied is not reasonably available," and, 2, "shall have entered an order for"?

MR. HERSEY: No. The two situations are, as I understand it, the library has a single subscription of a periodical or the library has a single copy of a book, but in neither of those cases the material is reasonably available, so it wants to borrow from another library. Then it is only permitted to copy to the extent that it could if it were copying from its own collection.

MR. MILLER: So one situation is shall have in force a subscription or has within its collection a copy or phonorecord or it desires to obtain from another library, but the material to be copied is not reasonably available for copying, or shall have entered an order for such a --

MR. HERSEY: No.

MR. MILLER: With all due respect, if I cannot figure it out sitting here after a half-hour there is a problem.

MR. HERSEY: That is true.

MS. WILCOX: I cannot imagine any librarian being able to figure this out.

JUDGE FULD: Really?

MS. WILCOX: I really do, because I cannot figure it out, either.

MR. MILLER: Excuse me, John. Could you describe it?

MR. HERSEY: Let me try. As I understand what the clause is intended to cover is this: A library has a single subscription for a magazine, to a periodical, or, secondly, it has a single copy of a book but it does not have either the copy of the magazine or the book reasonably available. In those circumstances, it is only allowed to copy as much as it could if it were copying from its own collection.

MR. LACY: How much is that?

MR. NIMMER: In those circumstances, the five number does not apply but instead it is as if they were not making an inter-library loan; it is as if they were doing it from their own collection.

MR. MILLER: Okay.

MR. FRASE: So they can make --

MR. NIMMER: Whatever they can make. It is not an unlimited number, but the five rule --

MR. FRASE: If it is one each, they could make an unlimited amount --

MR. HERSEY: No. They cannot do that.

MS. KARPATKIN: Wouldn't it help if (a) and (b) --

MR. MILLER: There is a different discussion that is going on right now. But they just decided they did not mean what they meant.

JUDGE FULD: I think it means what it says.

MR. LEVINE: I think it is time for fresh insight, please.

MS. KARPATKIN: Let me try it with (a) and (b): "In the event that a requesting entity (a) shall have in force or shall have entered an order for a subscription, or (b) has within its collection." Maybe you can even put them indented. "Or (b) has within its collection a copy or phono record of any other copyrighted work."

Now, I would take the word "and" in the third line and put it both places: "and the material is not reasonably available," because --

MR. PERLE: Indent (a) and (b) and bring this out to the margin.

MR. MILLER: One problem with that is you have eliminated "or shall have entered an order for a periodical," and I think that should apply.

MR. NIMMER: So it does not apply to the book.

MR. MILLER: You mean --

MR. NIMMER: If you have only ordered it but do not have it, you cannot treat it as if you have --

MS. KARPATKIN: Why would you distinguish between books and periodicals?

MR. PERLE: Frequently there is no way of ordering a book: if it is out of print and where the publisher does not know who has got it; it may still be in print but the publisher says --

MR. MILLER: Rhoda, all I want to know is what they intended. I think it should be (a) and (b).

MS. KARPATKIN: (a) and (b) are indented and (a) is left flush.

MR. WEDGEWORTH: I still raise the question that I think that all of this is unnecessary. It is confusing and the more I read it the more I tend to agree with Gabe that I would like to strike the whole thing except the last part of the last sentence in the paragraph and that is that "the library or archives may request a copy or phonorecord from a supplying entity only under those circumstances."

MR. LACY: I think you have to have the first part, that this is where it is ordered or entered a subscription for because that is what is distinguishing it from 1.

MR. NIMMER: That is important for the librarians. Then they are held to the five rule.

MR. WEDGEWORTH: I am saying that all of this other business in here is just very confusing and does not mean anything.

MR. PERLE: It has changed so much I do not know what it means.

MR. NIMMER: Maybe we need a fresh start tomorrow.

MS. KARPATKIN: I would put the word "then" in here to clarify.

MR. MILLER: "In the event that (a) or (b), then"?

MS. KARPATKIN: Yes. Okay?

MR. LACY: While some of us try to rewrite that more clearly overnight --

MR. HERSEY: Try on Irwin Karp's provision of leaving out the first half of this paragraph and just --

MR. NIMMER: Irwin might go for it.

MS. WILCOX: Irwin is not the only one that counts.

MR. HERSEY: You were urging leaving that out?

MS. WILCOX: No, I would not, on the condition they have a subscription because otherwise it is meaningless.

MR. LACY: I think you have to have that. While we are redrafting that, I think everybody has probably agreed to 3 and 4, haven't they? But 5 is not a question of use agreement; it is question of drafting. The statute itself, assuming it is enacted in its present form, then 108(i), if I can find it, 108(i) says:

> "Five years from the effective date of this act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this

section has achieved the intended statutory balancing of the rights of creators and the needs of users. The report should also describe any problems that may have arisen and present legislative or other recommendations, if warranted."

I think we ought to not attach the five-year review to that provision in the Statute. We do not have to bring it in as a guideline. We can refer to the fact that these guidelines will, of course --

JUDGE FULD: Be reviewed.

MR. LACY: -- be reviewed as required by 108(i). We do not have to urge it as a guideline; it is mandatory.

JUDGE FULD: I do not think you need the last two sentences.

MR. HERSEY: Let us do as little change as possible.

JUDGE FULD: Do you need the last sentence, though?

MR. HERSEY: No, I do not feel we need that.

MR. LACY: When you have got a legislative mandated review by the Register of Copyrights, it means a little --

MR. PERLE: The Register of Copyrights may say 108(g) (2) is perfect. Leave it alone.

MR. LACY: These guidelines presumably will become a part of the legislative history of 108. They have to.

MR. PERLE: Well, the words of the Statute may be the guidelines if the Commission -- I do not care.

MR. LACY: Also, I think it is presumptive of us to say that we should review something five years from now when the Statute requires that we expire in another year.

JUDGE FULD: I think it is wrong.

MR. WEDGEWORTH: So the only serious question we have relates to the --

MR. LEVINE: This was a specific suggestion, as I recall, of the Library Association.

MR. WEDGEWORTH: The only serious question is No. 2 and we are going to review this.

JUDGE FULD: I think we will recess now and resume tomorrow at 9:30.

(The proceedings concluded at 5:25 P.M.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, SUSAN M. HERINGTON, CSR 3088, a Notary Public in and for the State of California, do hereby certify:

That the foregoing transcript was recorded stenographically by me at the time and place herein named, and was thereafter reduced to typewriting under my direction and supervision;

That the foregoing comprises a true and correct copy of the proceedings had and reported by me.

I hereby certify that I am not interested in the event of the action.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal this 28 day of September, 1976

Susan M Herington
NOTARY PUBLIC IN AND FOR THE
STATE OF CALIFORNIA

SUSAN M. HERINGTON
My Commission Expires Oct. 21, 1979

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

VOLUME II

REPORTER'S TRANSCRIPT, taken at 9:50 A.M., Friday, September 17, 1976, at the Law School Building, Room 2435, UCLA, Los Angeles, California, by Susan M. Herington, CSR 3088, a Notary Public.

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OUR FILE NO. 34760

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

Law School Building, Room 2435, UCLA
Los Angeles, California

Friday, September 17, 1976
9:50 A.M.

COMMISSIONERS:

JUDGE STANLEY H. FULD, Chairman
MELVILLE NIMMER, Vice Chairman
RHODA H. KARPATKIN
HERSHEL SARBIN
E. GABRIEL PERLE
JOHN HERSEY
DAN LACY
ROBERT WEDGEWORTH
ALICE WILCOX
ARTHUR MILLER

ALSO PRESENT:

ARTHUR LEVINE
ROBERT FRASE
MICHAEL KEPLINGER
DOLORES DOUGHERTY
MARLENE MORRISEY

AGENDA

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Los Angeles, California, Friday, September 17, 1976, 9:50 AM

JUDGE FULD: Our next speakers are Patricia Ferguson and Donna Chamberlain. Ms. Ferguson is president and co-founder of Documentation Associates, a broad-based information services firm created in 1971. Prior to organizing her own company Ms. Ferguson did extensive work in the field of library research. She has a Masters in library science from the Graduate School of Library and Information Science, UCLA, and has co-authored many reports, including one which investigated and evaluated effectiveness criteria for medical library services.

She has also studied library environmental designs and, when working as reference book editor, she helped solve reference problems through development of plans for useful information tools.

Ms. Ferguson is joined by her general counsel, Donna Chamberlain. Ms. Chamberlain returns to familiar ground when she joins us today for she received her law degree from UCLA.

In addition to her legal experience and general practice Ms. Chamberlain set up an in-house resource information file on computer retrievable legal systems.

She also conducted a pilot survey of nonlegal information needs of lawyers in the California area. In addition, she has had five years of experience operating a library: cataloging, inventory, acquisition, maintenance, and also concomitant responsibilites.

The Commission welcomes both of these ladies to our eighth meeting and looks forward to their presentation on the copyright implications of the data base industry from the viewpoint of information sources.

You are to talk first?

MS. FERGUSON: Yes. Thank you very much. I am Patricia Ferguson and I am going to give the presentation and Donna is going to be available to answer questions that you might have, especially if they are on legal matters.

MS. CHAMBERLAIN: Which I will refer to Mr. Nimmer.

JUDGE FULD: Everything is legal here.

MS. FERGUSON: We very much appreciate the opportunity to come here and talk to you. I handed out a brochure which clearly states our position in the world of information as a for-profit firm.

JUDGE FULD: Could you talk a little louder?

MS. FERGUSON: Yes. I handed out some literature which clearly states our position in the world of information, which is as a for-profit firm. We view ourselves as an extension and a complimentary service to what is offered in libraries and most of us at the company are librarians or information scientists, so that is the world that we come from.

The brown list, which you might refer to later, is a list of the computerized data bases that we are currently searching.

Within the information industry, our kind of company is called an information broker or an information-on-demand company, or an information-on-request firm, both meaning that we provide a connecting way between the information and the user. We feel that we are representative of a rather new and unique business that has emerged in the seventies, this connecting business. In fact, there is one new company called Link; there is also one called Seek; and there is also one called Find, so four-letter acronyms are emerging.

Some researchers are predicting that our kind of intermediary firm will become a dominant force in the information industry in the years to come, comparing it to supermarket industries in the food industry. We have had a very encouraging growth in the last five years and we are hopeful that these researchers are right because we would like to become a broad-based large general purpose information distribution firm.

We try to provide a very complete range of information services and, specifically, these include the computerized data base searching, library searching, document retrieval, indexing, abstracting -- we have constructed the thesaurus -- preparation of literature review and state-of-the-art reports, information system design, consulting, and so on. We deal with information in all subject areas and we have focused in the last few years on -- because of the nature of the jobs we have obtained -- on drug abuse among humans, gerontology, oceanography, career education, subjects like this. We tend to use subject consultants as experts and we provide the information expertise when we are carrying out projects like this.

Our services are used by both Government agencies and organizations, corporations, and individuals. And they can range from a long-term multi-year project to a one-day literature search.

As an example of a long-term project, we have an ongoing contract with the National Institute on Drug Abuse which requires us to search out research on selected topics. For instance, we have done drugs and crime, drugs and pregnancy, drugs and sex, drugs and employment, and having identified a range of research reports we will select a balanced collection of studies and reports and abstract them in rather long summaries, organizing them into books, put an index in the back, and then the Government Printing Office publishes them, so it is an example of a large project.

As an example of a short one, the computerized literature search is a good example.

Our practices in the data base searching and photocopying, I will try to summarize. We view commercially viable data bases as a very crucial part of our operation and we use them every day. We have two in-house computer terminals; one is a printer only and one is a CRT with a side printer. We have contractual agreements with six commercial vendors -- I guess you'd call them commercial -- six vendors of data bases, including Lockheed, System Development Corporation, National Library of Medicine -- that is why I stopped on commercial -- Battelle, Informatics, and the New York Times. So we regularly research all data bases offered by those vendors. Totally, something over 40 at this point, but the number changes frequently.

Our information specialists receive training in all of the systems offered by the vendors and the data bases and this training runs from beginning through intermediate and then up through advanced and they also have researcher courses that are frequently offered. This is very necessary to keep up-to-date with what is in these data bases. We maintain a full library of researching aids, such as thesauri and word frequency lists, specialized dictionaries, and so on.

The print-out from the computer search is the product that we sell to a customer, in the case of computerized data bases, and we provide one copy of the bibliography and we do not keep a copy; we pass it on to the customer. Our charge is for our time and our expertise, computer connect time, and the citations and any consultants who may have been called in to help with that particular search.

We have been considering the market for multiple copies of computerized bibliographies and, at the same time, we have to consider the implications of that because there will be some copyright concerns. We aren't doing that at this point.

Each customer is interviewed at some length, it averages a half an hour, either in person or by phone to determine the kind of question. Then we select the data bases we are going to search from our list and we supplement this with library resources frequently and supply a cost estimate -- a not to exceed estimate. Customer okays that and then we proceed, so each search is individually priced at this point.

We also provide document retrieval services. We will locate and photocopy a document requested by a customer who will purchase it, get it on microfiche or intra-library or whatever method we can use to obtain it. Again, we are charging for our time, expertise, and the direct cost of the document. And, again, we provide only one copy. It could be a journal article or a Government report, a book, a monograph, an unpublished paper, a newspaper article, anything that is in print. We have no collection of documents ourselves. We access all available libraries as we access all available data bases. And we have too deposit accounts with NTIS, the Government Printing Office, the ERIC, and the British Lending Library, and any other large sources of documents.

We employ several retrievers, we call them, who are placed in local libraries and they will make photocopies of journal articles and other items.

We wanted to point out that without this photocopying capability, copies of most retrospective journal literature and out-of-print publications would not be available to our customers, and this is the service that we feel that we are providing to them. We also request many times directly from the authors, either by telephone or mail. We have a large mail acquisition service.

I did gather up some statistics, as you requested, on our customers and this statistical breakdown that I am going to give you is based on our commercial customers, not our Government customers. We have, in the last several years, performed some large contracts for six Government agencies and we have also served several hundred individual customers. These are the individual customers. In computer searches the types of customers are as follows:

41 percent of them have come from R and D firms, mostly in the local areas. These are the aerospace corporations and the manufacturing firms in Southern California. 32 percent come from the academic community, professors, graduate students, not very often undergraduate. 14 percent from what I call business persons. That would be company presidents, marketing executives, accountants, sometimes even attorneys, but not very often. Seven percent from social science firms, generally consulting firms. And six percent from individuals with individual interests.

In the area of document retrieval, our sources are as follows: Over half of the items that we have retrieved have come from local libraries, 52 percent; 14 percent from these large sources like NTIS, DDC, and GPO. In fact, those three. DDC is the Defense Documentation Center. 0.3 percent from inter-library loan, mainly because it is so slow. It takes us so long to get it back that our customers cannot -- it was ordered by the time it has arrived. 0.5 percent come by the U. S. Patent Office; 3.4 percent from ERIC, the Education data base; and almost 29 percent from letter requests where we will write letters to an author or other institution.

Now, the second breakdown on document retrieval is types of materials. Almost half are journal articles in our case; 14.6 percent, Government reports; 1.7 percent, books; 32.2 percent other reports. These would be from institutions, organizations, corporations, that kind of report. 1.8 percent, hearings and proceedings; a half a percent, patents; and 2.2 percent dissertations. It is kind of a detailed breakdown. This probably represents about 5,000 documents. I think. That is an estimate; we have not counted them.

At this point in time, we do not feel that we are violating any provisions of the copyright act, copyright law. But we also would like to point out that we don't feel we fully understand the provisions of the act. We don't know anyone who does, and we have consulted various experts who have different opinions. Maybe I should take that back.

MS. CHAMBERLAIN: That is fine.

MS. FERGUSON: At any point we have consulted people at the Information Industry Association, at the Copyright Office, and so on, trying to find out if what we were doing is, indeed, a violation. Again and again we can't find out whether it is truly a violation, so we, at this point, believe that it isn't, but we want to go on record as saying we are perfectly willing to pay royalties and we don't have any objection to it. What we need is a mechanism to allow us to do this.

In terms of the proprietory concerns of data base producers, those are affecting us a great deal at this point and we believe they are issues; the concerns that they have are very valid. We don't at this time produce a data base ourselves but we have the capability to do that and the interest and we might at some point become a data base producer, at which point their concerns would become our concerns.

Right now what is happening with us is as follows: When a data base producer imposes an access fee on a broker that is excessive on top of the computer connect fees and the citation charges, then the cost becomes prohibitive for us to access that data base unless we have a steady volume of use, and non-use of a data base by a broker results in a lower -- in lowered revenue for both the data base vendors and the data base producers, which, of course, they realize as much as we do.

For example, Predicasts data base, which is coming off our list at this point, has a $500 annual subscription fee per data base and they make several regardless of how much you use it and we can't afford to pay that at this point. Excerpta Medica, which is an excellent collection for medical search, requires a $350 initiation fee. We hope to be able to pay that soon, but we cannot yet. MEDLINE, on the other hand, has a monthly minimum of $15 which we can afford to pay because we have some customer usage in that data base and it is a low fee.

There are other restrictions on brokers that are discriminatory in certain senses. For example, Chemical Abstracts recently announced that searchers of that data base are not to be distributed outside the geographical site of the users. When this statement was prepared, this had not been clarified. I met with the marketing director of Chemical Abstracts last week and found out that a university is defined as a geographical site, so that would mean that any number -- that a library at UCLA could conduct a search of Chemical Abstracts and distribute it to the entire campus if they wanted to, whereas our firm, which is located in a suite of offices down here on Pico Boulevard, cannot distribute any searches that we conduct because our users are not at our geographical location.

However, Mr. MacDonald also clarified what the restrictions are going to be and they amount to a $50 annual fee for most of us who don't have geographical users and two cents per reference, which we will have to pass on to our user, so that is the situation with Chemical Abstracts.

The Defense Documentation Center is an example of a bureaucratically impossible situation where the user of the DDC data base must have a Government contract and need to know and be able to fill out countless forms and 10 to 15 copies very frequently in order to use their data base. We do go through this because a lot of our clients need it.

The Department of Justice data base, JURIS, is also only available to other Government agencies. We would like to be able to search that.

We really feel that information, whether it is owned by the public or a private sector, whether it is contained in computer data base or in a library, ought to be reasonably accessible and not prohibitively expensive and not surrounded with bureaucratic difficulties.

We are primarily a service business and we are trying to provide a service to people who are willing to pay us to find it and we want to make it very clear that we are prepared to pay copyright holders for the use of their materials and we are prepared to honor the proprietory concerns of data base producers for the use of their data base. Obviously, we would not be in business without both of those people, so they are very important to us.

In terms of the proposed provisions to the copyright law, we cannot really see that the proposed revisions of Senate Bill 22 speak to what we are concerned about. We think that we will still be operating under fair use provisions once that bill is passed. And we feel, also, that in a certain given situation we might be subject to criminal sanctions, depending on the circumstances. We know that there is still continued debate over the claim in the Wilkins case on whether that was infringement or fair use, and we cannot see, also, any explicit discussion of the problems associated with computer uses of copyrighted works, in the computer sense.

So we would like to support a change in the general attitude of the public concerning the basic rights of the copyright holder. What we would like to see is a system that would permit copying without advanced approval of the copyright holder provided provisions were made for compensation to the author.

In Section 118, which addresses public broadcasting, there is a policy that we would like to see extended to photocopying and data base copyright issues; that is, to seek to encourage broad access to copyrighted materials at reasonable royalties without protracted delays in obtaining permissions from copyright owners. But it was specifically for public broadcasting.

You must have addressed this issue before.

MR. PERLE: Yes. You hit a nerve.

MR. LEVINE: Not as part of this Commission but some of the Commissioners had very great interest.

MR. PERLE: You better get to your next point.

(Laughter.)

MS. FERGUSON: We support limitations -- well, in Section 108, our primary concern is that we are left out of Section 108 and it appears to address only libraries, nonprofit groups, archives, and so on, and by the process of elimination it appears that we do not fall into Section 108 and, therefore, cannot do that; cannot make copies as they can. We are already seeing cases where libraries are becoming very inhibited in the practice of sending copies to us when we request them. We get form letters that say "You sign this to let us off the hook" -- that is not what it says in the letter, but that is the implication of the letter. And so an officially signed statement is sent back to the library, at which point they will photocopy: more delay and more paper work is what is happening.

Well, I think to conclude, I just would like to say that we would rather not rely on a case by case resolution of our problems if possible and we would hope that the Commission could make recommendations for new legislation which will address the issues we are concerned with and, of course, we would like that to be in the best interest to the public and in our interest and in yours and in all parties concerned.

JUDGE FULD: Are there many others who compete with you in the same field?

MS. FERGUSON: There are at this point in time about

40 information brokers ranging from one-person operations up to companies with about 35 or 40 people.

MR. LACY: Do you have employees and major libraries who themselves make photocopies using the dime-in-the-slot photocopying machines?

MS. FERGUSON: Would you clarify what you mean "employees"? Are they our employees or the libraries employees?

MR. LACY: Your employees.

MS. FERGUSON: They are our employees and we send them to local libraries to use the machines.

MR. LACY: One of your competitors in another area apparently had enough business to keep most of the students pretty much on a several-hours-a-day retainer in the library doing that.

MS. CHAMBERLAIN: Just standing at the machines copying? Is that what you mean?

MR. LACY: Well, several hours may be an exaggeration. It would be by the library every day with a list of requests and it might take a half an hour one day and two or three hours another day.

MS. FERGUSON: That is approximately our situation. In this drug contract that I was describing, we will do large searches identified by perhaps 500 or a thousand possible articles that might be selected and we will send someone up with a list to photocopy so that we can review the article and determine whether it's appropriate for our selection.

MR. WEDGEWORTH: That is not an unusual situation. Research assistants, in fact, in departments do this routinely.

MR. LACY: Did you ever use an organization like ISI as a source instead of a university library, as a source for photocopies?

MS. FERGUSON: Yes, we do. And we have begun on-line ordering of it now that it's available. ISI and NTIS. The problem sometimes is the mail. It is so slow and that is all on the East Coast, so -- especially NTIS. It is a problem so we will choose --

MR. LACY: You have got the Government and a Government service both operating against you in NTIS.

MS. FERGUSON: That is right. We make the decision depending on how fast we need the item.

MR. LEVINE: You have the microfilms. Do you use them at all?

MS. FERGUSON: Uh-huh. Any place where there's a document we are bound to access it at some point.

MR. LACY: If you had a comparable institution to ISI here where you were not facing the mail problem, how would you find your service compared with getting it from the university library in terms of time and efficiency and so on? Putting aside the postal delay.

MS. FERGUSON: We would probably be more efficient. We would have to avoid hiring people and supervising and the time that is spent running around to the libraries finding out that it is in the bindery or that the pages have been ripped out, especially in the case of drug articles. We probably would be more efficient. We don't -- this is hard work we have to do to get these documents and if there were an easier way to do it, I think we would opt for it.

MS. WILCOX: Do you have a feeling about what years that journal concentration of either journal titles or year spans that you are covering?

MS. FERGUSON: No. Because we do so many different kinds of jobs.

MS. WILCOX: I was wondering, when you search some of your data bases, the length of parameters would determine pretty much your citations.

MS. FERGUSON: Yeah. If we are just --

MS. WILCOX: So probably most of them --

MS. FERGUSON: We are researching a computerized data base probably from 1965 and no farther back, but we do so much combination searches where we'll do Chemical Abstracts and go back -- search it back to 1869 or something. But you are right, in that context.

MS. WILCOX: Do you have any feeling at all what percentage would be less than five years or more than five years? Do you have any feeling?

MS. FERGUSON: Well, if it were not -- obviously, the past decade, there is a heavy concentration for us, but we just happen to be doing an oceanography project now which requires us to go back to the Challenger expeditions of 1860 or something, but that is a rarity. I think the recent decade would be the --

MS. WILCOX: Would you have any --

MS. FERGUSON: A percentage within that?

MS. WILCOX: Yes.

MS. FERGUSON: Yes.

MS. CHAMBERLAIN: In a five-year period.

JUDGE FULD: Could you talk a little louder?

MS. FERGUSON: If we are just talking about computerized searches, then I would say that the big emphasis is on the previous year -- not even the previous quarter, but the previous year. But when we are talking about Government contracts, most often the previous ten years or 15 years is required, so in terms of volume of all business, we do more Government contracting than computerized searching, so the emphasis would be on the decade. But if you took this little microcosm here, it would be on the last year.

MS. WILCOX: You can determine really your searches by asking for the most recent going back, or either way.

MS. FERGUSON: Yes, you can limit by date; date scope or something they call it.

MR. WEDGEWORTH: You touched on the data bases problem in an area that is of less concern to us; namely, the initiation or access fees, which is not really a copyright problem. But I would really like to have you comment in more detail about the requests of some data base firms that their data base have copyright protection, which would restrict the terms and conditions under which you could provide that information to your customers. Would you like to comment upon that? Have you had any experience in dealing with that situation?

MS. FERGUSON: Well, we have -- I found out last week that we are, apparently, in a position where we know what all the data base producers are saying and they do not know what they are saying. In other words, data base producers do not talk to each other because they do not want to be -- they do not want to get into any kind of price fixing or discussion of things. So at a meeting last week of the Association of Information Dissemination Centers in Louisville I brought up this very issue and discovered that other data base producers do not -- let's see. How can I explain this? I think I started something is what happened because I pointed out that one data base producer would not permit us to distribute searches at all and this sparked another data base producer who hadn't been concerned at all; so my comments are we would -- from our point of view, we would like to be able to conduct a search and sell that search to a customer and we would even like to sell it in more than one copy to many customers, the same search; and we would like to be able to pay the copyright owner for that privilege. This situation does not exist yet, as far as I know.

Well, all the data bases on this list, with the exception of the Predicasts, which are up at the top -- they are not called Predicasts any more. They are called Domestic Statistics, EIS Industrial Plants Statistics, and so on, which have to come off our lists -- all of them allow us to sell one copy -- I told you about Chemical Abstracts -- if we pay certain things in some cases and that is what we would like to keep on doing.

Are you getting at something even broader than that?

MR. WEDGEWORTH: Follow my question, then: What, in your opinion, are you contributing to this process?

MS. FERGUSON: Expertise.

MR. WEDGEWORTH: What expertise?

MS. CHAMBERLAIN: On the information or the data base?

MR. WEDGEWORTH: Whatever it is that you are passing on to your customers. The argument of the data base manufacturer or disseminary may be that we have put an enormous amount of money and expertise into the development of this data base and then you are in a position to simply take that and give it to someone or some ones at a profit to yourself. What are you contributing to the process, I think is my question?

MS. FERGUSON: I think I can describe that. I believe what we are contributing is analogous to a very large reference library which provides storage and interpretation -- storage space and interpretation of a large collection of documents. We are doing precisely the same thing by allowing people to call one place for access to many, many subjects which requires training to search. Certainly a reference librarian's mode of operation is used in searching these data bases, and I can tell you that it takes us approximately five person days per month simply to maintain the new materials that come from each data base. For instance, there are new methods of searching; frequently there are new user aids coming out; there are updates coming into these things; there are new data bases appearing all the time, and that is just the maintenance. So we are providing that. Then there is another five days of supervision of this kind of thing because we have now several searchers who are specializing in different subject areas. So, to me, the value that we are contributing to the world of data bases is the value of one-stop expert help with gaining information that is contained in these very valuable -- I agree with them -- data bases. We are the interpreters, although I do not like to use that word because we are not interpreting except in the sense we are conducting a search and, in that sense, we are the intermediaries.

MR. MILLER: Could I have some clarification on your concerns? One of the concerns I heard was that there is some ambiguity as to the legality under the copyright law of what you are doing. I take it that concern is primarily addressed to those instances in which you made copies of what you search. It is the old problem of reprography and duplication. Another concern I heard was the access concern and that, I take it, is a concern addressed primarily to the data base is our ability to gain access to nonpublicly located data bases like the six services that you described.

Now, on that side of the ledger, your access problem, as I hear it -- and I am just seeking clarification -- is some of them have very high fees which you just defined prohibitive; you cannot pay. Others with lower fees have variegated conditions and terms on what you can do with that data base in terms of secondary dissemination.

Now, I assume you have got contractual relationships with each of the data bases that you actually have in your services.

MS. FERGUSON: No, we don't. We have contractual relationships with the vendors.

MR. MILLER: What is your relationship with, say, Lockheed?

MS. FERGUSON: We have a contract.

MR. MILLER: With?

MS. FERGUSON: Lockheed.

MR. MILLER: Which tells you what you can do --

MS. FERGUSON: With the Lockheed data base.

MR. MILLER: -- with the Lockheed data base.

MS. FERGUSON: Yes.

MR. LACY: Not only with Lockheed but the data base proprietors whom Lockheed makes available.

MR. PERLE: She said, "No."

MR. LEVINE: Is that right?

MS. FERGUSON: No. We have written contracts with Lockheed and in that contract is specified the kinds of restrictions and nonrestrictions that apply to Lockheed's supplied data base.

MR. LACY: I assume that those are conditions that Lockheed suppliers require Lockheed to put in the contract.

MR. MILLER: At the moment, that is irrelevant.

You must live, I gather, under extremely different contractual arrangements with your different data base sources who, in turn, may have different arrangements with the sub-suppliers.

MS. FERGUSON: Right.

MR. MILLER: Okay. Are you asking this Commission to think about the establishment of relatively uniform access rules for companies in your position in terms of the pricing structure and in terms of the utilization you want to make of those data bases?

MS. FERGUSON: No.

MR. MILLER: It is a free market economy and freedom of contract and all that.

MS. CHAMBERLAIN: One of the concerns, I think, so far -- has not really been, I take it, your investigation -- it is whether or not these data base material, the information in the data bases, is copyrightable; if they have proprietary rights to that.

MR. MILLER: Let us say we do not. Let us say there is no copyright in what they have got. What more do you want from us? What more should we think about? I do not want to suggest that we are here with your -- like Oliver Twist.

MS. FERGUSON: You mean if all the information in the data bases is not copyrighted?

MR. MILLER: That is right.

MS. FERGUSON: What would we want? Nothing, as far as I can see.

MR. LACY: I do not think the situation would be any easier.

MR. MILLER: That is right.

MS. FERGUSON: No, it might not be any easier.

MR. MILLER: What I am trying to drive at is, at least in terms of your concerns about access to data bases, either in terms of dollar pricing or in terms of terms and conditions of use, I am trying to figure out whether a copyright has anything to do with that or whether it is a pure contract problem that you are faced with.

MS. FERGUSON: That is a contract problem, but the copyright problem, as I see it, is when we wish to make more than one copy of a data base material.

MR. MILLER: Why can't that be part of your contract structure? You have, no doubt --

MS. FERGUSON: It is not at this point. I do not know.

MR. MILLER: You talked about ambiguity as to the law. If you have a contract with Lockheed and it allows you to do certain things, if you pull some material off Lockheed's base and off Battelle's base, and off the New York Times' base, and you package them intoa new data base, you have just created a new data base from compiling things from existing data, and you try to sell that either as a new computerized data base or in hard copy form to a multiple number of users, you are an infringer.

MS. FERGUSON: Yes. I understand that.

MR. MILLER: What do you think this Commission should think about when my response to you is if you want that right you sit down and contract with those people for that right?

MS. FERGUSON: Then, if that is your response, then, okay. You are not going to address that issue.

MR. MILLER: I want to know what you think the issue is.

MR. PERLE: What relief do you want?

MS. FERGUSON: Pardon?

MR. PERLE: What relief do you want?

MS. FERGUSON: We would like to be able to do what you just described and perhaps I have not ably thought that that was a concern of the Commission. If it isn't and it is a contractual thing, then it is due to our lack of business expertise.

MR. MILLER: Do not let me push you off the point. What I am asking you is why you think in the Federal copyright statute there should be a provision that gives you an automatic right to do that, subject to either a negotiated or a Federally set fee for doing what I have described. In other words, do you want the United States Congress to destroy the right of freedom of contract?

(Laughter.)

MR. MILLER: In an absolutely neutral way.

MS. CHAMBERLAIN: Oh, I think that is too large of a question to address to two juniors in the law.

MR. MILLER: You are a conduit from Mel.

MR. LEVINE: Do your contracts now specify that these data bases are, in fact, under copyright? Is there anything in the contracts that suggest that --

MS. CHAMBERLAIN: No. Do you recollect?

MS. FERGUSON: No.

MS. CHAMBERLAIN: We anticipate --

MR. LEVINE: So the only restriction there is is a contractual restriction; there is no copyright restriction, and the question, I suppose, in part, is whether the contract can extend that far. Is there a basis for the data base owner to say you can make one copy, but you cannot make multiple copies without claiming copyright in the data base portion?

MS. FERGUSON: Some of the contracts, I think, between the, for instance, Lockheed and the producer company specify that the material is copyrighted. We do not see those contracts. What we get is a contract from Lockheed which will simply say, "You may distribute this"; "You may not distribute this"; "You have to buy the printed index in order to distribute this one." There are all sorts of different rules and regulations.

MR. PERLE: Does your contract with Lockheed require you to put any given notice on that which you distribute, whether in type or hard copy form?

MS. FERGUSON: The one instance of that is now Chemical Abstracts will require us to inform each one of our users that they are not to distribute it beyond their geographical site either.

MR. LACY: Did they require you to put a copyright notice in the American Chemical Society's manual or --

MS. FERGUSON: I do not know. I do not have the contract yet. I have just had this verbal interchange so far.

MR. MILLER: Could I ask you to try to address that point that Gabe put correctly: What relief do you want?

MS. CHAMBERLAIN: In terms of the access question?

MR. MILLER: In terms of the access question from this Commission or Congress.

MS. FERGUSON: Well, I do not think the access -- I don't know whether I should even try to answer it. But I don't think -- I believe that the information that I was providing you on pricing is simply information that I wanted to tell you because it does affect us.

In terms of access, what we are really concerned about from CONTU's point of view is not the prices, obviously, or the right to contract, but whatever kinds of copyrighting violations we might be incurring with our practices.

MS. CHAMBERLAIN: They think --

MS. FERGUSON: I already told you I do not understand the whole situation.

MS. CHAMBERLAIN: Some of the concerns we have had have to do with the chilling effect this legislation may have on the activities of libraries, which you can tell from our statistics, we have a lot of dependency on. 50 percent of our copying business comes from there.

So getting back to it, I think the primary concerns of CONTU, those are some concerns we have about how these are going to affect libraries and archives in terms of their interpretation. The problem with this kind of law being legal and librarians not being able to interpret it. We have been concerned about there being clear guidelines for the people who will be frequently affected.

MR. NIMMER: Are you now speaking with respect to photocopying activities?

MS. CHAMBERLAIN: Photocopying. Because I think the access issue is not really an issue. I think it was informational.

MR. NIMMER: On the photocopying, am I correct that your concern is that your access to be able to continue to photocopy exists, you are not -- you made it clear, I think, that you are not concerned with having to pay a copyright royalty on photocopying; you just want to be able to do it and not have to get consent in advance.

MR. MILLER: You will have to help me out because now you say it is a straw person issue.

MS. FERGUSON: The pricing part is whatever you called it, the straw issue. But what I am concerned about -- let me deal with realities here. There is a company, one company that is a competitor of ours that is -- maybe you have already heard from them, Editec . Have they talked to you?

MR. LEVINE: You are the first information brokers we have had.

MS. FERGUSON: Okay. They are searching these data bases and recording -- printing on-line instead of requesting it printed off-line and recording the information onto a minicomputer cassette and then reorganizing, rearranging, eliminating, changing in various ways the search results, and reprinting out from their own computer the results. Well now -- and distributing many copies, more than one copy to -- of the same search. Okay. Now, whether or not that is a violation is of concern to me because we might like to do it, too, and the reason I thought it was a violation was because all the data base producers are really screaming about it; they are very upset about it.

Now, does that more specifically tell you what kind of relief we might like? I do not know if we need relief.

MR. MILLER: What is the relief you want? It can come in one of two ways -- it can come in a number of ways. We could suggest the enactment of a statute that simply gave you the right to do that; which simply said, the copyright ends here and you can do anything you want beyond that. We could recommend the passage of a statute that said exactly the reverse; that said no, that is part of the monopoly, and they control that and you have to contract with them for that right. Or we could recommend the enactment of a statute that says it is part of the copyright, but as a matter of national policy they must give you access and that right at a negotiated or arbitrated fee. Do you have any sense into where on that spectrum you would like to go?

Talking about the compulsory license. For example, when the people from that data base come and say you have to use on-site; you have to have on-site users, that is an access limitation. It cannot be a straw person problem. It has got to be a real problem.

MS. FERGUSON: Compulsory licensing?

MS. CHAMBERLAIN: Right. You can give --

MS. FERGUSON: Tell him.

MS. CHAMBERLAIN: I should have Professor Nimmer tell. It would permit access without giving -- or are you saying beyond fee?

MR. MILLER: It could be either one.

MS. CHAMBERLAIN: Negotiated.

MR. LEVINE: Because you would pass those costs on to your --

MS. CHAMBERLAIN: Yes. That is compulsory licensing.

MR. LACY: The permission that Lockheed or whoever gives you to have access to their data base on whatever terms does not really rest on the claim on his part that he has a copyright in the data base; he certainly has a copyright because of it and it rests on the fact that unless he says you can, you cannot do it.

MS. CHAMBERLAIN: Right.

MR. LACY: The door is locked and you have to pay him to get the key.

MS. CHAMBERLAIN: Right.

MR. LACY: It would seem that Editec, the question with Editech is not whether or not it is a copyright infringement. It is a question of whether they drafted their contract adequately and many data base producers are now believing they have done a sloppy job of contracting.

MR. MILLER: You have to watch out yourself, you know, because you fully understand, just by using that Editec hypothetical, that at some day down the pike you may be a bigger data base supplier than a researcher and you will change your stripes and maybe not be happy with that.

MR. LACY: Editec might well want, in fact, to copyright and control access to their revised data base.

JUDGE FULD: Are there any other questions or do you want to say anything?

MS. CHAMBERLAIN: I would like to ask the question in terms of description of our operations and whether or not that constitutes fair use of copyrighted material.

MR. MILLER: I am not licensed to practice in California.

MS. CHAMBERLAIN: I think that is one of our specific concerns.

MR. PERLE: There are some problems.

MS. CHAMBERLAIN: There are some problems?

MR. PERLE: Yes.

MR. LEVINE: Let me ask a question or two that goes to precisely what you are doing. If you have five or six or seven requests in the same day for the same journal article, although coming from different people, I take it you would feel you are not infringing a copyright by making those six or seven copies?

MS. CHAMBERLAIN: I do not think that has happened.

MS. FERGUSON: You mean by coincidence?

MR. LEVINE: Yes.

MS. CHAMBERLAIN: We are offering a service and we would be servicing five or six individual requests. Maybe different retrievers would be duplicating efforts.

MR. LEVINE: The question is, whether the same retriever might be sitting at the same photocopying machine and making the six or seven copies.

MS. FERGUSON: It would be efficient to do it that way; right.

MS. CHAMBERLAIN: The cost effective concerns would be an item, but that would have to be our position.

MR. LACY: I am a publisher, not a lawyer, so I am free to give you advice. I have worked with McGraw-Hill and if you send a paid employee into a library to make a copy from a reprint from one of our journals and sell it to somebody else, particularly if they are for sale, a, I think you have infringed and, b, I have no intention of suing you.

MR. PERLE: The point is that McGraw-Hill and the rest of us who are data base proprietors are not going to sue you today. At the point where you start hurting us then, yes, indeed. At the point where your activities have economic impact upon his activity, then there is a problem.

What you are doing now -- I am not giving advice --

MR. MILLER: But you are threatening.

MR. PERLE: No, I am not. It is that sort of copyright infringement which I do not think anybody is going to do anything about at this stage in time.

MS. CHAMBERLAIN: Because it does not have that much affect.

MR. PERLE: But it is something this Commission has to deal with, is the need of people like this, in order to deal with information as it develops and the broker is not merely pointing people in the direction of material but supplying it, then we have to deal with it.

MR. LACY: I think there is another problem too, and, as was mentioned here, blind people who do not know about an organization that supplies photocopies on the basis of a license from the publisher and it has been suggested -- not only here but in many other places -- there is a much more efficient service than ordering it from a library; you get almost overnight service, instead of two or three week service and you do not have to maintain your own person to go do it as you do at libraries because of the slowness in the library's response.

Why you do not use IBEX is because it is only in Philadelphia. Why isn't ISI in Los Angeles? Because all of this is being done. If you could not do it and you had to go to somebody that was licensed that would almost certainly --

MS. FERGUSON: Not only that, but ISI does not have anything. We go to a lot of libraries.

MR. LACY: No. But what I mean is what ISI has and ISI would have a lot more, but I am no great brief for ISI; I have no quarrel with them. But I mean that type of institution.

MS. FERGUSON: We have used it. We are not boycotting it.

MR. LACY: There would be a lot more of that if one were compelled -- and I am not suggesting, Alice, that a library not be able to do it, I am saying if somebody is going in commercially into a library and on the library's site running a commercial photocopying service, using the library's machine -- I am not putting any restriction on the library, now -- I am talking about if you could not do it, if you had to either order from a library or order from a licensed photocopying service, commercial one, you would be very anxious to have that commercial photocopying service even if they charged you a little more because it would give you faster service.

MS. CHAMBERLAIN: Yes.

MS. FERGUSON: We would probably set one up.

MR. LACY: And you would be better off and your customers would be better off and the publishers would be better off and the libraries would be better off because they would not have your people cluttering up the library using the machine and drawing the stuff off the stacks. But there is a real social need to be served by having commercial licensed authorized photocopying services, and I think that the copyright law could be an incentive to that, if it is placed in a way it does not mess up the machinery first, before you get the new machine.

JUDGE FULD: Arthur?

MR. MILLER: Could you follow up on Gabe's point? Without telling tales out of school, there are, you said, about 40 or 60 companies --

MS. FERGUSON: 40 is the latest, the highest that I have heard.

MR. MILLER: -- like yours. You have described what Editec does, which I will just simply redescribe as bleeding off pieces of various data bases, compiling them, repackaging them, and vending them.

MS. FERGUSON: Right.

MR. MILLER: How prevalent is that kind of practice and what other kinds of practices are there that might, in the legal sense, hurt the data base proprietor?

MS. FERGUSON: I know of three companies that do that, what you just described. I do not know that it is none of their business.

Other practices that would hurt the data base proprietor?

You will say this is irrelevant, but one that concerns us is a lot of poor searching. I was talking about this last night and, that is, the need to establish some kind of a standard -- this has nothing to do -- but it hurts data base proprietors because we are marketing their product. That is the primary function, I think, of the broker and when we market or when we produce a poor product, which is a combination of this data base, that one, and that one, then it hurts the data base proprietor in the end, so there is a concern.

I cannot think of any more right at this point, but there are lots of other practices going on. I can't think of any that hurt.

JUDGE FULD: Bob?

MR. WEDGEWORTH: Fundamentally, there is no reason why the restrictions that you have pointed out with regard to data bases should not apply to other kinds of products. A data base via a terminal is essentially no different in content than that as a printed source. If we assume that in a new copyright bill that libraries are going to have to assume greater liabilities with respect to works under copyright, do you believe that firms such as yours should continue to be treated simply as another user in going into these agencies, using their services to provide services in terms of your customers?

MS. CHAMBERLAIN: Yes. I would think, yes, as opposed to somehow having to check in your commercial users, and you are treating different --

MR. WEDGEWORTH: The point that I am trying to get at is that somehow in this discussion you have always assumed that there is only the user out here and the proprietor, be it a data base proprietor or publisher of some large compilation, and this institution where you are getting 52 percent of your sources does not have any stake in the matter.

Suppose this institution would say, "Fine, you can come in provided there is an access fee that you pay to this institution? Otherwise we can start our own information brokerage business inside under the same terms and conditions that are extended to you by the proprietors." Now, the relationship is that in talking about the restrictions of copyright or the restrictions of the contractual arrangement, you have to consider all of the agencies that are involved.

MS. FERGUSON: We want to do what your button says -- I just noticed it -- "Documents to the People."

(Laughter.)

MR. WEDGEWORTH: I do not think there is any violation of that. There is no violation; there is nothing that you are doing that did not emerge out of traditional practices that these institutions teach people how to do every day. I am simply saying it is more complex than simply changing your contractual arrangement because the agencies where you are getting most of your information are still liable for whatever infringements take place on their premises.

MS. FERGUSON: Are you going to be hearing from Information Unlimited?

MR. LEVINE: No. We may at some point, but there is no plan at the moment.

MS. FERGUSON: Apropos of this issue, they are in Berkeley and the Berkeley Library has taken away all of their library cards -- they had a lot of them -- because their primary business was photocopying and their primary customers are special libraries. Okay? Located around -- all over Arizona, New Mexico.

MR. WEDGEWORTH: That is exactly what I am talking about.

MS. FERGUSON: So they are in great trouble at this point and they are in need of help.

MS. WILCOX: This issue gets further complicated because of some legislation supporting major research libraries saying they have to provide access to everybody.

MS. FERGUSON: What legislation?

MS. WILCOX: There is some proposed legislation.

MR. LACY: Why did the library at Berkeley do this; because they were getting to be a nuisance and over-using material or because they were afraid that they were becoming liable for infringements if they permitted it on that scale?

MS. FERGUSON: Well, if I can speak for the owners, they started out their business with an open policy of going directly to the head of the library and saying: "This is our business; this is what we intend to do;

what rules and regulations would you like us to observe?" They have been successful for seven years, but then a new library head came. His reason, his publicly stated reason for doing this, was there was heavy continued usage. They check out over 100 books a day. The reason he knows that is because they do not use his photocopy machines; they take them outside of the library where they can photocopy them without hassling his library. That is their reason for doing it. Okay? So he knows the level of their use.

We, on the other hand, unobstrusively do it. We hire college library guards; you never know what they are up to so no one knows --

(Laughter.)

MR. SARBIN: It is now on the record.

MS. FERGUSON: They have beepers in their pockets.

That was his reason. They have even offered to be a friend of the library to endow it with money to end it; they have offered to do all sorts of things; nothing helps. What he wants is a very high fee per use: $2 a document.

MR. LACY: I take it it is not a copyright concern that he is complacent about it because he is willing to be an accomplice if he gets paid for it.

MS. FERGUSON: The other thing that he is doing that I cannot understand, is he is distinguishing between Information Unlimited, which is a for-profit company and a hundred special libraries that they serve that are in for-profit companies and he is saying, "Those special libraries can come here and check out anything they want and photocopy it; you cannot do it for them." That does not make any sense to me at all.

MR. WEDGEWORTH: Isn't there any reciprocal arrangement between the institutions?

MS. FERGUSON: Which institutions?

JUDGE FULD: The specialized --

MS. FERGUSON: Them and UC Berkeley?

MR. WEDGEWORTH: Yes.

MS. FERGUSON: I do not know what kind of reciprocal -- oh, you mean inter-library loan-type thing? Yeah, but they don't want that. You know why? Because that takes six weeks. They all use Information Unlimited, every one of them.

MR. WEDGEWORTH: That is the oldest type of cooperative arrangement existing in this country and it is a primary basis for those arrangements.

MS. FERGUSON: Then why does this company exist?

MR. WEDGEWORTH: Which company?

MS. FERGUSON: Information Unlimited.

MR. WEDGEWORTH: I am not arguing. I think they are providing a very fine service, but I am saying you cannot distort --

MS. FERGUSON: But that is the difference.

MR. WEDGEWORTH: -- a traditional relationship and say there is no difference; there is a difference.

MS. FERGUSON: What is different is that Information Unlimited has nothing to give.

MR. WEDGEWORTH: There is a service that is being shared.

MR. NIMMER: You have asked for a distinction, what is the distinction between the for-profit corporation and the for-profit libraries which it serves and maybe there is no meaningful distinction, but the latest version of 108 in the House Report suggest just that kind of a distinction. I wondered whether you think it makes sense. They say that one who photocopies -- the 108 library exemption goes to nonprofit operations, but they define, as included under nonprofit, a for-profit enterprise as long as there is no profit to be realized directly from the making of the photocopies. That is, if Shell Company has their own library and they make photocopies of material that will indirectly help them make more money, but they are not making money from the making of the photocopies per se, then that is not for profit. That is just where your distinction comes in.

The operation that goes to the library is making a profit directly from making the photocopies by giving it to the Shell library; whereas the Shell library is not making a profit directly from the photocopies but they are making a profit indirectly because what is photocopied permits them to make more money.

MR. WEDGEWORTH: But there is another primary condition.

MR. NIMMER: About access of the public?

MR. WEDGEWORTH: That is right. And that is that these libraries have to have some arrangement whereby their specialized collections are accessible to the public and I think that is a primary condition and a primary distinction to be made.

MR. NIMMER: Except the House Report seems to ignore that and it is a problem, I agree, Bob.

MR. LEVINE: It is in the Statute.

MS. FERGUSON: If I understand what you are saying, then we are doing both. We photocopy many things from which we will not directly make a profit but indirectly, and those are the items that --

MS. WILCOX: You directly --

MR. NIMMER: Don't you directly make a profit by virtue -- you have a customer walk in --

MS. FERGUSON: Wait a minute. There are two kinds of things that we do. When we photocopy 600 drug abuse articles and select 200 of them and abstract them and put them into a book and then provide it to the Government and make our little seven percent profit, which is all they allow on the total job, I don't think we directly profited by making the photocopies.

MR. LACY: But you have got seven percent of what you paid out to copy the 400 copies that you did not use; you include that in the price. You make just as much money copying one that you do not use that you do make copying the ones that you do use.

MS. FERGUSON: Right. I think the other business of actually photocopying a document and selling it to a customer, that is the other side.

Is the U.S. Government violating --

MR. LEVINE: Can I ask just one quick question?

MS. FERGUSON: I wanted to bring up an issue -- maybe there isn't time -- that we didn't want to put in print.

MR. LEVINE: That sounds far more intriguing than my question.

MS. FERGUSON: Are we taping this?

MR. NIMMER: It is all public.

MR. LEVINE: There is a stenographer present.

MS. CHAMBERLAIN: There is a stenographer taking it down.

MR. LEVINE: Yes, this is a public meeting.

MS. FERGUSON: I guess I will not do it, then.

MR. SARBIN: You can tell Mr. Perle outside.

MR. PERLE: Talk to me later.

MS. FERGUSON: It is only that I wanted to do it for the good of the public interest, but there is no sense punishing us.

MR. PERLE: Can you paraphrase it?

MS. KARPATKIN: Could we go off the record or into executive session or something?

MR. MILLER: There is no reason why we cannot go off the record.

MR. LEVINE: Let us briefly go off the record.

(Discussion off the record.)

MR. LEVINE: May I ask one quick question -- the answer to which I am sure I know. Fiction, poetry, is that any percentage at all of the type of work that you do or is it all in the scientific and technical --

MS. FERGUSON: That we photocopy?

MR. LEVINE: Yes.

MS. FERGUSON: Yeah. It's a smaller -- small, minute portion, but we've been known to do it.

MR. LEVINE: Minute?

MR. PERLE: For what?

MS. FERGUSON: For a customer who requests -- we do get searches in humanities areas and we do a search in the library since there are no humanity data bases and then sometimes photocopy.

MR. LACY: What kind of questions do you get in humanities?

MS. FERGUSON: An example would be a student's dissertation on the life and works of George Byron. I don't know. Something like that. We will do a literature search in support of that student's dissertation.

JUDGE FULD: Thank you very much for a thought-provoking discussion.

MS. FERGUSON: You are very welcome and we appreciate it, too. It was also fun.

MR. MILLER: Mr. Chairman, could I ask if our staff could try to assemble for the Commission copies of the contracts that data base suppliers use so that we can get some sense of the terms and conditions that might limit access?

MR. LACY: That would be very interesting.

MR. LEVINE: We already do have the contracts that SDC and Lockheed enter into with people like Ms. Ferguson's organization, but we will try to get the other contracts. Perhaps we may even have them.

MR. MILLER: Maybe you can get a compilation of the relevant cases.

Los Angeles, California, Friday, September 17, 1976, 11:00 AM

JUDGE FULD: Our next speaker is Dr. Peter E. Weiner. He is the head of Information Science Department for the Rand Corporation. He received his Ph.D. in 1966 from Brooklyn Polytechnic Institute. He worked first as an assistant professor at Princeton University and then as associate professor at Yale where he has created a new computer science department and served as its first chairman.

His recent research at the Rand Corporation has been involved with the interface of humans and machines. In this context, he helped design an implement system that allows convenient entry in manipulation of tapes by computer editing programs.

Among Dr. Weiner's many professional affiliations, he serves on the Editor Advisory Board of the International Journal of Computers and Data Bases.

Dr. Weiner will be the first speaker CONTU will hear concerning the new topic: New Works Created by Computers.

We are happy to welcome you, Dr. Weiner, to our session.

DR. WEINER: It is great to be here. I would like to state that what I am about to say is not necessarily the views of the Rand Corporation or its sponsors.

THE REPORTER: Could you speak up a little, please?

DR. WEINER: Although I do want to thank --

MR. SARBIN: Excuse me.

Would you rather have him up here?

You speak softly, so let us change places.

DR. WEINER: I do also want to mention that two of my colleagues, Dr. Rein Turn and Norman Shapiro, have spent some time discussing issues with me and thinking through of the substance that I have to say, and I want to get my thanks on the record for their help.

I will talk about new works issues, but I have actually come to talk about some broader concerns. I want to try to stretch the Commission's thinking in the direction of flexibility from having a body of law that will respond to the changes in technology over the long term; and I have taken it upon myself to decide that this means to think about the technology as it will evolve over a 25- to 50-year period. Now, I do not think that I can responsibly predict with any real accuracy what the technology is going to be in that time frame, but I would like to offer some speculation anyway because I think it will be relevant.

Essentially, I am looking towards a world which will be essentially computer based. By that, I mean that terminals and computers in homes and offices will be commonplace. We will have systems of computerized commerce that, for example, include the notions of electronic fund transfers; this will be commonplace. There will be much less dependency on paper than we have today. For example, I expect that systems of electronic mail will be used quite -- by quite many people.

Perhaps most relevant to the concerns of this group is, I envision, individuals, say, in their homes accessing ordinary literary works through computer terminals; that is, the words will be stored in data bases and people will read these works, not in hard copy form through a book, but rather through use of the new technology.

Now, what I wanted to do is offer some general comments about the significance of all this as I see it; then talk specifically about the role that computers will play in producing some of the works in the new works issue; and, lastly, at the end, discuss perhaps some of the technological developments that I see that will make -- leads me to this speculation, why I think this may, in fact, be the case.

Copyright laws, of course, deal with many, many different areas. I am going to try to limit my discussion to some books, things -- when I go to a book store and I buy something. I don't want to get into areas of phonorecords or movies or the other types of issues.

I would like to make some very basic types of comments and it relates to the original goals of copyright and the mechanisms that have been used over time and the question as to whether those mechanisms are really appropriate for the future. The fundamental goal of copyright, I guess, is simply to promote the arts. That is, to encourage the recreation and distribution of works of authorship. The basic mechanism, as I see it, is to essentially control the making of a copy, the creation of a fixation. What the basic mechanism does not try to do is in any way limit the way this copy is used. That is, if I go into a book store and buy a book, I am certainly allowed to pass this among all my friends and allow them to read it as well.

I guess what I am trying to suggest is there doesn't seem to me to be anything fundamental or significant about this mechanism other than it works. It sort of reasonably encourages works of authorship to be produced and it does provide for rather wide distribution of these works to the public. Certainly it worked quite well in 1909 and even today it still largely holds as a good mechanism. But I want to suggest that it is not necessarily the mechanism that should be at all followed in the computer based world when the information that is now in books are instead contained in information systems.

I guess I am suggesting that of the alternatives that I have seen in the research plan that I suggest you might consider that you indeed seriously consider the idea of examining new concepts of intellectual property laws; those not limited to the traditional copyright framework. I recognize this is not an easy task at all, but I think it is an important one and I will try to give some specific reasons for it.

What is needed, of course, in some general terms, is simply basic understanding of what is really allowed to happen with information systems and, also, how, in essence, returns to authors and investigators are managed. Rather than trying to control the basic notion of the creation of a fixation, instead, it seems to me, other notions like more directly trying to control, if you will, the use of a work. That is, in particular, perhaps arranging for mechanisms where return is generated to an author if merely a single page of his work is read by a person in that person's home, using a computer terminal. I think the technology in the long run can support this and that this is an interesting way to consider.

MR. NIMMER: Isn't there a kind of fixation if it appears on a screen; it is ephemeral, but --

DR. WEINER: Yes. It is completely true that one can take the present copyright framework and try to bend it to the new technologies and say, "What we had before is a fixation on paper is now a fixation on a screen." We can say that the running of a computer program is a performance in the computer because the --

MR. NIMMER: Performance is also not a fixation but it is recognized in the present law.

DR. WEINER: Yes, of course. But if we change the mechanism to which we try to promote the arts in this fundamental way we may arrive at a fairer and more efficient system; one that, in fact, does a better job of achieving the overall goal of what copyright is supposed to do.

I guess even though this becomes conceivable and more relevant in a time frame which is quite far out, I think one of the fundamental points I want to make is that every issue that is arising today with respect to data bases and software will essentially arise in the future when we get to this computer based world where the conventional literary works are accessible as well. So that what I am suggesting is that one not try to bend the present copyright laws today to handle the data bases and software issues; that is, not try to simply say that running a computer program is performance and, therefore, it is covered under the present framework, but rather develop new frameworks today to handle the present problems that are really here today and that will lay the way and the groundwork for eventually handling this entire new way of life that will be around in 50 years.

Perhaps I can make that point clearer by showing some issues that arise now within data bases and software and drawing the analogy to how those issues will arise with respect to conventional works. Of course, there is a problem: Conventional works in 50 years -- that is, the things that are now essentially obtained by going to a book store will not be quite the same any more; they won't be so conventional, but I think the distinction should be clearer.

For example, within the software issue we worry about the different forms that an object might have. It can be as a source program in binary code; it might have various representations within the computer. Essentially, this is going to be true for works when they are stored as well. Certainly in a trivial sense I might store them in different computer systems using different codes. I also might have them stored in computer systems including formating information that allows it to be displayed in different devices more easily; I might find that it is necessary to compact information, compress it, so it can be more efficient for storage and, therefore, might be in a somewhat unrecognizeable form, but clearly equivalent; it might be cryptic for some reason; or, again stretching to what the future might really be, it might be in the form of a computer program itself. I certainly can go to a book store today and buy a handbook of physics and chemistry. If I wanted to put that handbook in a computer system it might be the case that I would really store the equations in which a lot of the tables are generated and when a person wanted to access that work, instead of opening up the book and turning the page, he issues commands which would display the results for him in a way that he can perceive them but, in fact, what was in the computer system was not off that table but rather the program.

That already shows, in a way, my second example, which is that the -- it may take the execution of a computer program itself in order to be able to perceive the work. But I think this also will be true for other works other than this specialized example. For example, it may be found convenient to store in a computer a form of a work and to allow a computer program to produce a derived work from it rather than store the work and the derived work as well. If I want to access the derived work, perhaps I will access it by running the computer program. I suspect that as authors become more acquainted with the computer as a tool, a creative tool, we will find computer programs embodied into literary works themselves in a much more -- in a way that is dramatically different from what we do today; but still, I see this as conceivable in the long term.

Now, the literary works stored in computer systems may themselves be perceived by other computer programs in the same way that a numeric data bases and scientific data bases are perceived by programs today; that is, I might not want to read through some historical work but I might like to see a few pages relevant to some events of a certain time and relating to certain circumstances, and I might ask the computer program to read through that work for me and simply produce on my screen the relevant portions of that work. Well, here again, is a case where perhaps the author of that work ought to get some return based on my examination of his work and perhaps even a different kind of return because it was examined largely by a computer program and only small parts of it were examined by the actual human. But what I am trying to show is that whereas in the data base problem today we have to worry about machine access of data base and extraction of information from that, so we will have to with respect to conventional works in the future.

As one more example: We look at a data base that changes every day and we wonder whether it can be copyrighted; does it have to be copyrighted every five seconds because it has changed, or do you somehow copy the dynamic data bases as it is changing in some way? I just feel sure that authors, once they are provided with the possibility, will also produce works of authorship that will be dynamic in somewhat the same sense. An almanac, for example, that is kept current. Or I could even -- stretching my imagination -- think of a novel that changes from day to day as current events change.

MR. NIMMER: That is really no different except in the present situation where a different edition of a book or a play -- changes are made in a play during the run of its performance and --

MR. MILLER: That is known as a soap opera.

MR. HERSEY: Because the programs intervene along with the author in a way that it does not happen when you have different editions of a work.

MR. NIMMER: I do not know what you mean by the "program."

MR. HERSEY: He is talking about a situation in which the computer may be a participant in the changes in the novel.

MR. NIMMER: Doesn't that simply facilitate the change, but it does not change the problem?

MR. HERSEY: It is a corroboration. It is different.

MR. NIMMER: You are getting to the other part about copyrighted works created by a machine?

MR. HERSEY: That is right.

DR. WEINER: Well, again, the question is, do you want to take the current copyright framework and adapt it so that when copyrighted works every five seconds can come by some automatic means without having to refile in some way?

MR. NIMMER: You do not have to file to get a copyright.

DR. WEINER: I understand. I am still leading to the notion that new frameworks are needed. They seem appropriate to me for software and data bases and I think in the long run will be appropriate for conventional works as well.

MR. LEVINE: But the ephemeral nature problem still remains, if, in fact, there is a change every five seconds and I capture the change that occurs at 11:20 and 35 seconds and copy that, but it is gone forever to the copyright owner to prove that at 11:20.35 this was his version of the work; then the question is proof, that type of thing.

DR. WEINER: Well, the point that you raised brings me to the main area of discussion which is the new works and the role that the computer plays in producing these works. I see that the Commission is interested in at least three questions in this area: First, can a computer program be thought to generate a copyrightable work in any sense direction; and if so, when is a particular work copyrightable; and then, assuming that we have a copyrightable work, who owns the copyright interest?

Well, this is one set of questions where, at least to me, I see a path that can be followed to an analogy that can be said that will help make these issues, in fact, rather easy to deal with. The analogy is to consider what a program produces to be equivalent to what is produced as a work for hire. That is, consider the program to play the role of an employee, if you will. Now, what this means is that if you want to decide whether a work is copyrightable or not, I suggest that you use criteria that applies to the work and its relationship to other works and not at all to the nature of the author, as I see no reason to distinguish between a machine or a person. I only want to look at what has been produced because in principle, I can ask a person or, if necessary, an army of people, I can hire them to do essentially what any machine can do.

Now, when it comes time to answer a specific question of who has the right to a particular work, then what one has to do is look at the relationship of what the hypothetical employee has done and what contractual relationship has been set up to define who owns his product. That is, if I am given a computer program by someone and I am allowed to use it with no constraints, then I can think of that program as being my employee and if I use it in some way I have produced a work that is essentially mine for -- and I have the copyright interest.

On the other hand, if you write a computer program, think of that program as your employee, if I want to use your program to help me create a work then I have to negotiate with you and ask you to allow me to use your employee in pursuit of my activity.

MR. NIMMER: Do we have time for me to ask a question?

JUDGE FULD: Sure.

MR. NIMMER: That is an interesting analogy. Let me pose this hypothetical: Suppose in the middle of the Arizona desert there are rock formations and the rocks fall in such a way that they rub against other rocks and create interesting designs. Suppose I buy all of the land surrounding certain rocks so that those rocks belong to me. Now, can I claim copyright in the design that the rocks make because I own the rocks? Is it a work of authorship?

DR. WEINER: Well, I am not sure I have the legal background to answer that. I suspect not.

(Laughter.)

DR. WEINER: But the point is that all the interesting subtle questions that can be raised can be reduced to interesting subtle questions that do not have a computer any more. You have replaced the computer with a person. You still have an interesting set of questions that still may be difficult to decide --

MR. NIMMER: As I understand it, as long you are saying a human being is giving instructions to a computer, what to do, and then the computer does it, that indirectly is the human being that is doing it. I am wondering -- and I do not know -- whether the analogy is more like that or whether that is the fact or whether it is just an analogy like my rock one where the inanimate object completely on its own does this. But you are saying just because I own the computer, therefore, I should have a copyright interest?

MR. LACY: Could you give us a hypothetical example of something a computer does without somebody having told it to do something?

MR. NIMMER: Well, it may be that -- you are right, Dan, but in that case, then, the employment for hire relationship is not the analogy because in the employment for hire, unless it is under supervision where the employer is saying, "Now, do it this way," or, "Do it that way," but it is a real kind of independent contract, like motion picture writers, et cetera, who are, because they are doing it on their own, then it is not one human being telling the other or one human being telling the computer, but it is the computer doing it on its own.

MR. PERLE: Maybe it will develop with his exposition.

DR. WEINER: Let me try to stretch this example, although I feel on somewhat weak grounds to deal with this particular case. If I train a person to go out and rearrange rocks in the desert, then what he produces might be of different nature than if it is just rocks falling by themselves. If I write a computer program which then controls a machine for going out and doing it, this, in my mind, is no different from training the person to do it.

MR. NIMMER: I agree. Then there is no problem. Then you have a human being doing it. Then it is not the computer who is your employee; it is the man who does something with the computer, that is your employee.

DR. WEINER: I guess I draw the analogy of the program to having trained a person to do a certain job. In writing that computer program he has created a hypothetical employee and he has trained him to do it and he has endowed him with certain skills and abilities. Now I want to use that employee for my purposes. I go to the creator -- presumably that employee in some sense is proprietary property as a program is proprietary property which, I imagine, is protected under some body of law, whether it is the copyright law or not -- it is owned originally by the person that made it. And now I want to use that program in some way to produce a work for myself. Perhaps what should be necessary is that I will have to write a contract with the creator of that program that agrees that we share the copyright interests in what is produced.

Now, what I tried to do in thinking about this is, in fact, think of a number of subtle and strained circumstances where the computer is involved and, in the end, I finally came to the point of view that the computer can be taken out as a computer issue. You are still left with difficult and subtle issues, but think of the computer as an employee, and it seems to address almost all reasonable cases.

(Discussion off the record.)

MR. PERLE: Is it the program that does the job? Isn't the program a set of instructions?

DR. WEINER: Uh-huh.

MR. PERLE: I think you may be close. But I am having a little trouble with the concept of somebody writing a program which is a series of instructions which someone can then manipulate and select from and tell that programing to work on a data base, an information, and come up with a result so that it is not the program that is the person. The program is a machine; is it not?

DR. WEINER: Yes.

MR. HERSEY: What Peter is saying is the point at which you make it go to work it becomes a person. That is the analogue for a person, when it does the work.

MR. PERLE: Is it the program that is doing the work or the machine that is doing the work? See, I am a little --

MR. MILLER: It is the programed machine.

MR. PERLE: The program is a combination of the two.

DR. WEINER: Of course. Well, let us see. Let me branch off in another direction, in other types of examples: Suppose I buy a machine which sprays paint on a canvas and I can control the levers that make that machine spray the paint various ways; then I presume that work of art would be copyrightable if I put enough of myself into it.

MR. PERLE: Unquestionably.

DR. WEINER: I could have had a person stand there and hold a nozzle and do somewhat the same thing, assuming he had all the dexterity to keep up with the machine, and the analogy holds there, also. When you get to the point where the machine does it by itself, the paint spraying-thing, and the person stands there and does nothing, it is not at all clear any more whether the person who bought that has a right to copyright that work. All he did was buy a piece of machinery and let it do its thing.

MR. SARBIN: Didn't somebody have to give him a set of instructions?

DR. WEINER: The instructions sometimes are built into the mechanism of the machine. He just turns a switch and out comes the paint and it sprays on to the canvas.

MR. PERLE: You are talking about a printing press; that is what you are really talking about. The stamping impressions. But instead of stamping them it is --

MR. LACY: It seems to me this whole thing was actually a nonissue from the beginning. If it had ever come up around a half or three-quarters of a century ago and somebody had said, "Is a photograph written by the camera or is it written by the photographer? That no human being has painted this picture; therefore, it is not a work of authorship," the analogy with the camera is really very close. I do not think anybody is suggesting that a computer ever writes anything that somebody has not told it to write, just as a typewriter never writes anything nobody ever told it to write and an adding machine never calculates anything that somebody never told it to calculate. I think that the action is of a copyright examiner getting cute once and raising the issue with one registration that got this dropped into the moor of all of our concerns. It really just is not much of a problem. I agree with Mr. Weiner. I take it he is stating it is not much of a problem.

MR. LEVINE: There are a couple of things that I have heard of that I think are coming along: artificial intelligence and heuristics. Again, are we in the same area? In other words, does the computer only operate based upon what the human tells it to do?

DR. WEINER: That is a very good point. People view computer programs and the computers running the programs in different ways. Let me take the two examples:

On one extreme you think of a computer as just carrying out the simplest type of recipes doing the simplest kind of operation and moving something from here to there, adding to numbers, very simple type of information transformation operations but it effects something useful by doing them at a very, very interesting repetitive way.

Other researchers in the field go right to the other extreme. They feel that you can build in such sophistication in programs that the effect of running the program is very hard to distinguish from what a highly intelligent person would do and such programs are, in fact, called "artificial intelligence programs." For example, there is a program which I can converse with and answer questions about, the sample of moon rocks that was brought back and I can answer very general questions of how many rocks of a certain color came back and what was their specific density and talk in a very natural language way. And an awful lot of computer processing goes into carrying out the operation which is very easy for a person, but it is beginning to approach the kind of things that people do.

Again, I think this is largely irrelevant to the issue; I am agreeing it is a nonissue. When you hire someone to do the job for you it doesn't much matter if it is a clerk you hire or whether it is an intelligent person. Highly intelligent people can be asked to do things which do not produce copyrightable work; clerks can be asked to do things which produce copyrightable works. It does not really matter if we think about the programs as having intelligence or not. Think of the program as being an assistant which has been made available to you, hopefully through contractual arrangements which keep the bodies happy as to what is going on and reducing the issue to one of a nonissue.

MR. LACY: The camera analogy really appears there. You can get a camera that does not just give you the same image that the human eye sees but does what an artist does: Accentuates, contrasts, emphasizes the reds, blurs and mists the picture if you want it to, abstracts from the scene a particular element you want seen that does not make the operation or the camera or the work any less a copyrightable product.

MR. NIMMER: It is still the effectiveness of the human entity that triggers this, but I guess you are not saying anything to the contrary.

MR. LACY: Let us say the first time a copyright computer, which no human being has ever given any instruction to, whatever it produces, the work will raise the issue, but we will postpone it until that happens.

DR. WEINER: Let us go in that direction for a moment. Suppose I train clerks to carry out certain operations which result in their reading of meters that are on the wall, carrying out some computations on these meters, and producing a weather report. These people that I hire to do that.

MR. NIMMER: But you have told them what to do.

DR. WEINER: I have told them what to do. Now, what they produce might be copyrightable. Again, I do not want to offer legal opinions in this area, but let me assume that it is copyrightable. If a computer program is engendered to do this routinely, day after day, it is the same things that those people were doing, then what they produce should be as copyrightable as before.

MR. NIMMER: Absolutely. But because you were there in the first place to tell them what to do or to tell the machine what to do. I do not want to beat this -- I think it may be a dead horse because there always is some kind of human source to it. I just pause because it seems to me sometimes I hear you saying it really does not matter, intelligence does not matter as long as it is done; the result is all that counts. I come back to, there has to be some --

DR. WEINER: I think what you are saying is quite pertinent to my point, too, that it was -- the program essentially was put together by a person who gave it certain abilities, if you will, trained it to do certain things and that is equivalent to having trained another person to do it. From there, the conclusion follows.

MR. PERLE: If I read you correctly, what you were saying is that if I want to end up with a product -- let us say I want to end up with a piece of music which has a melody and chords and orchestration, and I want it to be based on Chopin and let us assume that Chopin is a living person and it is all of the things that Chopin wrote, which has triplets in it, all three notes put together, and I ask somebody to design a program which will scan all of or somehow store and manipulate all of Chopin's works so that I can put them together in a rhythmic way. And then in turn orchestrate, record it so I can play it on the piano, and with accompaniment, and maybe play it for me and then add the string section and the base and all the rest of them. There are a whole series of different operations, different people doing it. There is me, who wants it; there is the guy who is developing the data base, I guess, he is supplying all of Chopin's material -- we are getting it from somewhere -- and there is the guy who is developing the program. Each of those people have some sort of stake, whether it is a work stake or an economic stake. How do you divide up in that division in terms of copyright? I guess what you are saying is that dividing up the pot is a contractual relationship.

DR. WEINER: Exactly.

MR. LACY: The computer is no different from putting out an encyclopedia. Hundreds of people participate in various ways in doing that and you are still --

MR. PERLE: I am a little bothered by the program because by traditional terms the man creating the program and the analogue of the program itself, the program becomes a joint author. If you are going to carry the analogy through then I, by contract, have to deal with that joint authorship, I think is what Mr. Weiner is saying.

MR. LACY: Or you hire a guy to do it so you become the author that worked behind it.

MR. PERLE: And then I own the program. But where it is a preexisting program, I have to deal with it so that the product of what it does --

MR. LACY: I do not see that this is any different from any complicated editorial product. I think the computer --

MR. WEDGEWORTH: The only case where that might be true is where you have an inadvertent product and it seems to me that that, too, would resolve itself the same way you do under other circumstances; if you have a contractual relationship where the employee or the agent says that everything they do belongs to the company, then it is already answered. If you do not, then that is still negotiated.

MR. LACY: If the computer does something inadvertently without anybody telling it to -- that happens to human beings, too.

I have a manuscript in front of me the woman produced by automatic writing. It is a biography of Jesus and she does not know what spirit told her to write it.

MR. WEDGEWORTH: The point, though, is that it does not really make any difference and it is possible to have something done which is not precisely the result of direct instructions. I mean, you cannot really say that. And the analogues of programs that are being developed where you provide general instructions to a computer that tells it how to play chess, you cannot really say that the human told it to move the rook to queen eight; it just does not happen. There are other things that are going to develop in the future, but, still, the problem is I do not think it makes any difference.

MR. NIMMER: Here maybe it does. Jerome Frank, for example, in one opinion, said that if an artist's arm moves inadvertently because lightening is striking at the time, still that movement is protected. But there is a further component and that is, under the Constitution, Congress can enact copyright laws only for the protection of authors so that you have to have a human entity, an inadvertent human act is protectable. An inadvertent act by a machine that is not directed by a human arguably is not the act of an author within the Constitutional sense.

MR. LEVINE: Another question that Gabe posed, he used Chopin and that is borrowing somewhat an analogy that Arthur Miller used last week in another context. But instead of Chopin, it was Burt Bacharach. Let us say one of his compositions was put in and they wanted a new work by Bacharach. Is the author the person who programed it or is the author Burt Bacharach?

MR. LACY: Gabe stipulated that Chopin was alive.

MR. PERLE: One of the things the Commission should note here is that this analogy breaks down in work made for hire because it does not fit in under the definition of 101 right now. But that is just an individual.

MR. HERSEY: I would like to hear the rest of what Peter was going to present.

You spoke of some other --

DR. WEINER: I did not want to suggest, by the way, that new works issues would not be -- will always be easy to resolve in practice.

I want to say at least that in computers, of course, things can happen a lot faster and short of time frames and involving more complicated situations than perhaps ever in the past; that is, we can certainly think of complex multiple party interactions sometimes involving little human intervention along the way and this certainly will produce problems.

Also, I think in the area of the use of computers to produce derived works, we have potential problems. It may be very difficult to decide or even to detect when a derived work has been produced. That is, the principle I enunciated before still holds true: Think of the program as a person but in practice it may get very, very difficult to keep track of all that is going on.

I think also the issue of integrity of work comes up, something of which I suspect is of concern to authors. For example, a novel is written and someone comes along and writes a program which allows me to read that novel but allows me to read it in a form that has been personalized to me -- in fact, that is even no different from a service which is commercially available today, except it does not take a standard work and modify it; it derives personalized work. Should this be of concern to authors that their work is modified in this way before they are presented to users?

If I take a photograph and it is in computerized form, someone could write a program which will shake around the bits that make up that photograph and come up with one that is different in some way, enhanced or modified. Perhaps as the person who took that photograph I do not want that to happen. What this raises is an interesting question which I am not really sure in my own mind what the answer is. But the question is: Should, in a new framework, should one have some control over how the work is used? That certainly is a departure, as I see it, in many ways from what the case is today, but it may become important to think about that in the future. I am not sure.

In any case, the last thing I wanted to get to was a brief discussion of some of the technological developments that I am familiar with that make me think that the computer based world that I spoke of at the beginning is, in fact, a conceivable conjecture for the 25- to 50-year period. Let me do that by talking about a few things that I see being developed today. Some of these things are used in my daily work as a researcher and that I think will be undergoing advanced development and serious testing in the next five to ten years, if not sooner, and perhaps will be commercially available 10 to 20 years from now, although maybe only to specialized markets on a small scale.

First, I want to mention the developments which are leading more and more people to become on-line with computers in getting their works directly into machine readable form. That is, I do not want to talk so much about optical scanners and digitizers which can tape the work, but rather the developments which are putting people directly into contact with computers, to bring their works into machine readable form in a direct way. I am referring to machines and programs which basically do typewriter-like operations except that the key strokes are captured and are manipulable. Essentially, I see the business world moving in this direction and we will find word processing and office automation systems become more and more heavily used simply because of the efficiency that this will entail for business operations. I think also it is interesting to view these devices as devices which might play some role in helping an author in his creative work; but I guess from the point of view of the copyright laws, that is not of prime concern, although it will just have a further effect of bringing more and more individuals into contact with computers.

In the storage area, I know of today places that are using devices that store a trillion bits. There is, up at Illiac 4 Project at NASA Ames, there is one such device on-line now and there is one company, Computer Corporation of America, which is attaching a device to a particular computer a PDP-10 and is actually selling today a commercial service in a store of this size; so the problem of coming up with storage devices to store large amounts of information, library source information, is certainly almost at hand and conceivable in the near future as an economic reality.

Once information gets into the machine and is stored, we will need mechanisms for communicating it around both from center to center and also into the home.

Here I wanted to discuss briefly my experience with the Arpanet which is an experimental computer network produced by the Advanced Research Project Agency in the late 1960's and one that is getting extensive testing today. This network has over 200 computers attached to it right now and utilizes a technique of communication which is called package switch digital communication. It originally was put together as a network to facilitate resource sharing among computers. That is, if I want to run a computation in my computer but it is overloaded, I will have a mechanism for running that program on someone else's computer at some other location. But what was found to be true is that perhaps the more important resource to be shared was the file system. In practice today, we find people going out over the network, retrieving documents that are stored on other computers because it is more convenient or less expensive to keep the information in the file systems of that computer.

What has turned out to be an interesting development in use in the Arpanet is that its main role as a resource-sharing device has been supplanted in some way as its role as a message system. This was not really the notion that was behind the development to the Arpanet but, interestingly enough, it has turned out that one of its main applications has been simply as a way to generate messages on a local computer and transmit them over the network to storage locations in other computers.

MR. PERLE: What do you mean by "a message"?

DR. WEINER: Oh, a memo; a short set of paragraphs that I just composed that -- any collection of texts that might be on my local computer.

MR. PERLE: Who is calling for the message?

DR. WEINER: Basically, I want to send a note to someone telling them that I will arrive in Washington next week at 11:00 o'clock. I sit at the computer --

MR. PERLE: That sort of communication?

DR. WEINER: Yes. I sit at the computer terminal and I compose, using existing programs, something that says just that and I essentially run a little program which asks me, "Who do I want to send it to?" "Who should get copies?" "What is the subject of the memo?" And, then, the body of the text.

MR. PERLE: So it is person-to-person communication?

DR. WEINER: Person-to-person communication. Which today on the Arpanet connects over 1400 people. I can sit down at a terminal and address little messages to any one of 1400 people and have that message arrive in a matter of seconds.

I do exchange in my daily work messages with people on the East Coast three to four messages a day, back and forth, if there is some issue that we need to discuss without using the telephone system.

The point of all this is that it is highly suggestive of electronic mail systemsthat will extend into your homes in the foreseeable future. In fact, I understand the Postal Service has let about a $2,000,000 contract to a division of RCA to study the feasibility of the electronic mail system as it applies to our nation's mail service.

I guess what I am really trying to say is that there are a lot of developments which are pushing us in the direction of a computer based system. That does not directly relate to the kinds of applications that have to do with things of concern to this Commission, but they are happening independently and they are going to provide the technology and they are going to provide the familiarity with computers to bring about situations that will be of concern to this group.

Lastly, I wanted to talk about the output devices and the displays. Here the question, I guess, is, will people really give up hard copy books and allow themselves to use some of these other forms of examination of works? The devices that I see in the laboratories today have quite high resolution. They produce on screens images which are very hard to distinguish from terms of the resolution from that on a printed page. There is serious thought being given to shrinking the size and weight of these devices so that they may, in fact, even feel and look like a book in terms of physical size. This is perhaps the furthest out thing in terms of being able to say when this may actually be, but I know that it is seriously considered the notion that one carries around in a person's hand something the size of a book which has enormous amounts of computing and storage capability.

MR. PERLE: And viewing.

DR. WEINER: And viewing capability. I guess people generally think of memory and computing as going down by a factor of two a year in either cost or expansion in two-year capability. Even if that two years means three years or four years, it does not take very long. Let us say, 50 years for three orders of magnitude for improvement to have taken place and people do believe that in this business there are at least three orders of magnitude of improvements that can be made to support that.

In fact, I want to direct you particularly to some research being done at the Xerox Palo Alto Research Center under the direction of Allen Kay. He is looking at his concept in the future which he calls the "Dynabook." A Dynabook is exactly the notion of a small object the size of a book you carry around that is your personal computer and your personal connection to other computers. They are today prototyping this device, although certainly not in that size and weight, but they are developing the applications that will make this device a useful tool in the future.

Finally, I wanted to comment on the question of whether people will really change their habits and start using devices if they become available. There, I really wanted to refer to newspaper industries which, in what I regard as a remarkably short period of time, we find the places where reporters work and editors work completely changed in their way of doing business. Reporters put their stories now on computer terminals; they are routed around to editors for examination, and then they are shipped directly to the presses, and the ways that people used to use, which were basically typewriters -- the typewriter technology has completely changed in a dramatic fashion. And so to think about changes of the types that I described at the beginning over a 50-year period of time, seems quite reasonable to me.

MR. PERLE: Can you tell us a little more about the Dynabook?

JUDGE FULD: About what?

MR. PERLE: The Dynabook.

DR. WEINER: The Dynabook? Well, I did, in fact, bring with me a report that this group has issued. Perhaps it might be worth it to just show their conception of what this Dynabook will be. I do not know if it should be passed around or shown, but essentially their notion is something of this size and with a screen of this nature that will be, in the long term, economically viable for the ordinary person to own. The computing power that will be required in such a device is probably 100 to a thousand times the computing power which is economically purchasable by a person today, but that, too, is viewed as coming in the future. Their view is that the people interact with these devices through keyboards and also through a voice that comes from mechanical transducers in the Dynabook and perhaps through styli which are used to mark right on the surfaces, display surfaces themselves; that is, the notion that one might look at a displayed text and decide to delete something from it by just drawing an arrow around it and say, "Take this away."

MR. PERLE: This is not a mere viewing device. It is not in lieu of a book; this is a whole system?

DR. WEINER: No. Their concept of the Dynabook is an interactive personal computer that allows input and output.

MR. PERLE: Is it in any way dumpable into somebody else's book or system?

DR. WEINER: Certainly. I mean, the exchange of information between Dynabooks would be the easiest of things to accomplish.

MS. KARPATKIN: What would the inputs be? Where would they come from?

DR. WEINER: Well, in the world that I have been referring to where conventional works are stored in large data banks, connection to a network would allow the transfer of a work from that data bank into the storage of the Dynabook.

MS. KARPATKIN: So you would have a contract with Lockheed?

MR. HERSEY: You would have a contract with Alfred Knopf.

MR. LEVINE: Or no contract.

MR. MILLER: There is a notion of the tummy-sized computer terminal which you would read from in bed. Here you can sit at a desk --

MS. KARPATKIN: A practicing lawyer could do research that way.

MR. HERSEY: But you could also get up some of this data and manipulate the data yourself just by writing on the thing and then the machine would make the corrections and return it to you?

DR. WEINER: Yes. That certainly is conceivable.

MR. MILLER: The machine could take every third word from one of your books, from Albee's books, and from Taylor Caldwell's books and write a new book for you.

MR. HERSEY: Thanks. I mean that.

MR. WEDGEWORTH: What about the Book-Of-The-Month Club service where this month you can plug in overnight and get John Hersey's latest work to carry around with you in your briefcase and read a few pages every few days, if you like?

DR. WEINER: Yes.

MR. HERSEY: More than that, you can get the machine to change it and give it a more interesting plot, as I understand what you have been saying.

MR. LACY: Substitute one's own name for the name of the hero.

MS. KARPATKIN: Give it a happy ending.

MR. LEVINE: Everyone will go to the seashore at the end of every novel.

DR. WEINER: There is one other --

MS. KARPATKIN: Could this print out also the Dynabook?

DR. WEINER: Yes. In fact, I just wanted to get to one other technological development which I think, as a matter of fact, is just really right around the corner. That is, the connection between the copying technology and the computing technology. Devices are being tested today, I know, that can output on a piece of paper information stored in computer readable form in a way that you cannot distinguish that of a photographic resource process today. So, in fact, taking the work stored in the computer system today and printing it out in different thoughts on the computer control, is quite easy.

DR. WEINER: Which suggests to me that in the long run the copying problem and the computer problem are going to become one.

MS. KARPATKIN: What was the process by which you produced this?

DR. WEINER: Very crude. This was just an ordinary computer line printer. Unfortunately, at Rand I do not have sophisticated devices.

MR. LEVINE: Was this typed at 6:58 P.M.? Is that what 1858 means?

DR. WEINER: It was actually printed at that time.

MS. KARPATKIN: It was not typed. It was produced.

MR. LEVINE: Yes. I am rooted in the old technologies.

JUDGE FULD: Any questions? Alice?

MS. WILCOX: Do you have any feeling about how this might be controlled in the sense of paid for on that, or anything like that?

DR. WEINER: Yes. If we think into the long term, then it certainly seems conceivable to me that mechanisms can be built into every computer that keep track of minute exchanges of information and, in fact, runs on a basis that is just quantitatively quite different than it is today. It seems to me that legislation, in fact, can encourage the development of this. After all, we do have legislation which insists that every TV set that is sold today have both the UHF and VHF device. In the same way, we can have information systems in the computers, that even those in the home contain within them the mechanisms for recording back to the information about what has transpired within the system in a way that will result in a fair return.

MR. HERSEY: It seems to me that from what you have been saying it is terribly important that this process be started now so we do not face the situation with these devices that we do with copying machines where the policing and return system has not been built into the machines and we are now going to be faced with a great problem of reversing that.

DR. WEINER: Yes, exactly.

MR. HERSEY: You were talking about setting up a new body of law to deal with copyright for data bases and programs. Can you elaborate on that at all? Have you thought about the nature of that?

DR. WEINER: Essentially, I was trying to suggest the simple thought that the basis of return be on the use of a work. As an example: If I have a computer program, I really do not care how many times it is copied or where the copies go; if I have a data base, I do not really care if somebody copies into their machine. What I really care about is once it is copied into their machine, what are they going to do with it? Are they going to search it in some way? Essentially, a framework is developed so that the return to me is derived from their using my product.

MR. MILLER: Your analogy to the legislation that requires a TV set to give me access to UHF and VHF is interesting. Can you perceive the development of this kind of a device and the legal structure that requires the holders of data to give me access? In other words, if I own one of those things, by legislation, it would be appropriate or inappropriate that I automatically have access, say, both to Lockheed and Battelle or to Knopf and Doubleday or to CBS and NBC, whatever the information units are.

DR. WEINER: I feel the technologies in that time frame I referred to would support that. That is certainly possible and one that --

MR. MILLER: Do you think it is socially desirable?

DR. WEINER: That is what I was going to say next. There is certainly an area of once you get considerable examination, the next step, obviously, is for information of various kinds being reported back to central sources and it leads to serious questions of privacy and personal rights.

MR. MILLER: What about the resultant monolithic character of information and its centralization and control over it, perhaps by Governmental agencies?

DR. WEINER: Well, if we get to the point where information is stored in a single place and under one body's control, that would be a concern. But I do not see that as a necessary consequence of technological developments.

MR. MILLER: Under your view of the world, which seems quite appropriate to me, it is no longer a question of centralizing one place. The information itself can be distributed nationally, but it is the control over the links that becomes the key question.

Is there any research being done on that question at this point?

DR. WEINER: I am not aware of research that deals with the issues. I think you are most concerned with the social and legal implications of that, but I do not mean to pass this on, necessarily.

JUDGE FULD: Are there any other questions?

MR. PERLE: Is there anything else that is going on at the Rand Corporation that this Commission can benefit from? You are in the business, really, of looking into all the things that are happening down the line. I just wanted to tell you the reason for my question. Some of us here have realized the extent of trying to get away from any conventional thought and just say, "What is going on and what is the picture going to be a hundred years or 50 years from now?" Then we can develop a philosophy of balance of respect and rights of the participants. Trying to get into what is really going to be the shape of the future is very difficult. Is there anything else that your --

DR. WEINER: There is work going on that is relevant to this, but it is not really -- knowing the details of this work are not going to be of central concern to this group.

We are, ourselves, participating in the development of software which will run in personal computers that will help people deal with the complexities of a network that they will have to connect into. That is, if I need to pull some information from someplace out of some computer that is attached to a series of networks, the way the world is today, I have to ask for that information in very, very complicated ways. Perhaps some of the ways that have been -- some of the things are necessary to get into the New York Times' data base may have been described here. Today they require a real specialist to be able to access information to the New York Times. The software we are working on allows a person to specify in a much more natural way what he wants and then this software, which we call intelligent agents, goes off and carries out the transaction with the network and facilitates the search of -- in this case -- the New York Times data base. So we are, ourselves, contributing towards what will have to be a whole series of small steps that will eventually take us down this small path. But eventually

I am suggesting that the average person will be able to deal with this complexity of networks in a way that will be comfortable and reasonable to have.

MR. MILLER: It sounds to me as if you are automating Documentation Associates, eliminating the broker by making it possible for the average person to do what the broker now does.

DR. WEINER: That is not the objective of our research.

MR. MILLER: But isn't it a by-product?

DR. WEINER: It may be a by-product.

MR. MILLER: It is amazing how short the life cycle is of the various brokers --

MR. MILLER: You wake up this morning --

MS. KARPATKIN: This morning they were here and by lunchtime they are obsolete.

MR. MILLER: By the time they solve their legal problems they will be gone.

JUDGE FULD: Thank you very much, Dr. Weiner. It has been a delight having you.

DR. WEINER: I enjoyed being here.

JUDGE FULD: Do we have any other business, Arthur?

MR. LEVINE: Just lunch.

JUDGE FULD: That is not business.

(Lunch recess.)

Los Angeles, California, Friday, September 17, 1976, 2:00 PM

JUDGE FULD: Our next speaker, Donn Parker, is senior information processing analyst of the Information Science Laboratory of the Information Science and Engineering Division of the Stanford Research Institute. Mr. Parker is published widely on the subject of computer abuse. In addition, he has taught computer programing and security and several related topics at universities around the country, including San Jose State University and the University of Michigan.

He has also worked in private industry for such giants in the computer industry as General Dynamics and Control Data. He has served as a chairman of the Professional Standards and Practices Committee of both the Association for Computing Machinery and the American Federation on Information Processing Society.

CONTU welcomes you, Mr. Parker. Tell us about the computer abuse studies made by the Stanford Rsearch Institute.

MR. PARKER: Thank you very much, ladies and gentlemen. First of all, my remarks are my own and not of my employer, Stanford Research Institute, nor the supporter of most of my research, the National Science Foundation.

Susan Nycum testified before you last May, I think it was, on the same subject and she and I are co-investigators of computer abuse research.

So you can better understand what I have to say, my background is in computer programing and management of computer systems and of software development organizations. Five years ago I started with a concern for the safe use of computers and found that there was very little information on the subject; and in the mid-1960's even started collecting various cases that have occurred involving computers. Here I defined computer abuse, as Mrs. Nycum did, as any incident in which a victim suffered or could have suffered a loss; perpetrator made or could have made gain; and involves an intentional act in computer environment -- and I will explain what I mean by "computer environment."

This covers a broad spectrum of crimes that put people into jail on one end of the spectrum, to disputes that might cause an employee to be reprimanded or to lose his job; and all kinds of activities in between: Business disputes that result in civil cases are the broad definition. The reason for it is that we are looking for ways in which we can make computers safer to use, both through the law and through the performance of people in the computer field and those that use computers. So we have a double purpose in the investigation; it is an empirical study with the idea that we should learn from experience and apply this to potential victims: The organizations that use computers and people that are served by computers.

The problem has grown significantly over the past 15 years but still represents a relatively small problem, considering the general problem of white-collar crime. We have 420 cases in our files today and we are continuing to gather them, a few per week. Just last week, for example, there were three major computer-related crimes. One was a $14,000,000 gasoline theft in San Juan, Puerto Rico; another was the prisoners at Leavenworth Prison who are writing computer programs and have computer time-sharing terminals for Government agencies, and one of them apparently found the secret algorithms or rules that determine when a tax return is to be audited and used that information to get -- at least he is being tried right now -- for getting $20,000 falsely from the IRS. The third case --

MR. PERLE: How did he do that?

MR. PARKER: Well, it is not clear yet, but the most secretly held information IRS has are these rules and limitations that make them decide when to audit a tax return and when not to look at it and let it pass through. They have been doing contract programing for the IRS, the Department of Agriculture, and so on.

MR. LEVINE: They best not computerize their cell-block locking system.

MR. PARKER: I think that is another computer than the one they use.

The third case was here in Los Angeles where a gang was indicted last week on criminal charges where they had been charging up to $1500 to change someone's credit information from negative to positive in credit reporting systems by having an insider get into the TRW Credit Data Reporting System. So these things are just churning along and we are trying to keep up with them. The growth seems to be expansional but I have a very small sample of what is probably going on, so it is difficult to tell. All we know is we have a lower bound of what is going on and it looks like it is going up significantly. But 420 cases is not very many compared to the 10,000 cases per year of just bank fraud and embezzlement reported by the FBI, for example. Losses in the hundred and fifty cases in which we have been able to determine losses seems to be running around 10 to $15,000,000 per year. Again, only amounts that we can actually prove are losses and that does not include the Equity Funding Insurance fraud which is the largest fraud in the United States, $2,000,000,000. That throws my curves all off, so I just leave it out. The $14,000,000 fraud last week is going to blow the budget for my whole year, so there are many peaks.

MR. PARKER: An important thing, however, we find is that when computers are associated with a particular business or white-collar crime, the losses tend to be far higher than they are in ordinary or manual white-collar crime. The average bank fraud and embezzlement was $19,000 in 1975. The average bank fraud and embezzlement involving computers in a study of 54 cases was $450,000 per case. We suspect the reason for that is that as businesses automate, as the environment in which white-collar crime, business crime, taking place automate, that the crime itself will automate along with it and you might just as well run a crime for another half a second and take $2,000,000 as $2,000. You go to jail a shorter time, anyway.

(Laughter.)

MR. PARKER: In any case, they are the same old crimes: fraud, larceny, theft, embezzlement, sabotage, espionage, and so on. But once you name the crime, we find everything else about it is new: The occupations of the people that are doing it are new; the environments in which they are doing it are new; the methods that they use are new; the forms of the assets are all new. That makes a new problem and it is a problem that is confounding prosecutors, law enforcement agencies, and victims of these problems.

The nature of the problem could best maybe better be illustrated by some cases and describe the roles that computers play. We have identified four specific roles -- and Susan Nycum mentioned these before so I will only briefly mention them. One is the computer -- is the object of the incident, or the software or the data is the object of an attack: vandalism, bombing of computers, this type of thing. I have four cases where computers have been shot with guns, for example. In a couple of cases they were a tax processing computer and a job placement computer. Presumably, people just so frustrated and outraged taking their vengeance out on computers.

The second is where the computer is the tool to perpetrate the act. An accountant used the computer to simulate his company. Embezzlement, by the way, is very hard work and it can be very complex. You not only have to run your normal job but you have all this complexity of stealing and it is a very great challenge, except when you have a computer.

A teller in New York City didn't have a computer; he had only a transaction access to a computer and he said after his first million that he was going to get caught because he couldn't keep track of it any more. He had it on little pieces of paper stuffed in his pocket, sitting in his desk, and at home, and he was running out of brains to keep track of it.

In another case, an accountant modeled his company on his own computer, unknown to his company. And he would run simulations with the correct data and then the changed data that he was making to regulate his embezzlement. He also wrote a program where he could introduce the bottom line of a set of accounts and the program would statistically distribute that among the accounts so it would be less noticeable. He was very successful; he got a million and a half over six years until he finally decided that he would like to end it and could not figure out how to do it. He finally went to an attorney, explained his embezzlement, and the attorney said, "I can get you off for $50,000," and the guy said, "Fine. Let us go." The idea was that he was to get caught, but caught in such a way that he would get a suspended sentence. It goes on from there; it is a long story. But it turned out he had trouble getting caught because he was going to overdraw these accounts in his bank so the bank would discover the fraud rather than his boss, who he knew would kill him if he found out what he was doing. And so he overdrew his accounts in these dummy vendor companies and nobody paid any attention to him. Anyway, things backed up on him and he served five and a half years in San Quentin for his million dollar crime.

MR. MILLER: How much did the lawyer get?

MR. PARKER: He got $25,000 because he dropped the lawyer as soon as he found out the lawyer was a personal friend of his boss and there was a $50,000 check written from his boss to his lawyer. As I say, it goes on from there.

Let me get into the third role: where the computer is a symbol -- and we are not very interested in that from, at least, a legal point of view. But dating services that claim they match people for dates and they have a card sorter in the back room, this kind of thing. It is a symbol for intimidation or deception, a giant electronic brain.

The fourth way is probably the most important here. That is where the computer presents a unique environment or a unique form of assets. Just as an example, historically we have moved from bartering goods and services to precious metals for negotiable assets, liquid assets to paper representing precious metal, to paper alone, and now we have plastic money and we have electronic money. Electronic money means money that is actually represented electronically and magnetically inside a computer and squirted through telephone lines. An electronic fund transfer is an example of where we are moving rapidly into the new form of electronic money where the money is not represented anyplace else except in the computer system and crime goes where the money is and if the assets, the monies, are in the computer, that is where it goes.

Some examples of cases that have involved data and computer programs, a rather inocuous one was where programmers were found using the computer in an unauthorized fashion to produce Snoopy calendars. This takes a tremendous amount of printing to print out pictures in the form of solid patterns of characters and so large amounts, like tens of thousands of dollars, was being spent in running off one after another of these Snoopy calendars. So there is this kind of malicious mischief-kind of activity.

Something close to that is McDonald Hamburgers that had here in Southern California, the Southwest States, I guess it was, a major contest -- it was a drawing-type of contest -- that required you, on any kind of a piece of paper, to write your name and address and stick it in a box at any McDonald's and then there was a drawing. So some students at Cal Tech here in Pasadena used the computer to create 1.2 million of these little pieces of paper and stuffed them into the boxes, and it represented a little less than half of the 3.3 million that were collected for the contest. They wound up collecting $40,000 worth of prizes. Burger King gave the man who discovered the idea a scholarship to Cal Tech.

(Laughter.)

MR. PARKER: But that created quite a bit of concern; if not legal, at least ethically.

Then there is Professor and Mrs. Pennypacker of the University of Florida. Theirs is a case that they -- well, actually, as far as I know, they haven't filed a civil suit on it yet. But Professor and Mrs. Pennypacker developed a personalized learning system involving the use of computers, software, and a large body of data that was being developed that you could compare the progress of students against. They did this in their own private company; they then went to the University of Florida, the Professor at a teaching position and his wife as director of the personalized learning center for a two-year contract, she thought. She was fired and in the hearing on her firing, the issue came out that the University of Florida -- it was claimed by Professor and Mrs. Pennypacker -- had stolen all of their software and their data stored in the university's computer system. The president of the university heard about this and returned at least a copy of all this material to the Pennypackers and said it was an unfortunate incident. Professor Pennypacker is not satisfied with that since he is not sure that the original was returned to him and that he still is the sole custodian of his programs and data. So he is filing a suit against the University of Florida and the University of Florida's position was that a great amount of computer time and personnel time paid for by the university went into advancing the state of the software and the data. So I think there will be a pretty interesting civil case in this situation and one that we are starting to see and starting to face increasingly, and that is in trade secret theft at least, but all kinds of theft of information: what constitutes conversion and when is it the original and when is it not?

The data and the programs were kept in the system under a security password, but the university that runs the system was able to gain access to the system without having to go through the security process so they were able to remove copies of the whole set of programs and data.

In a slightly different direction, we are starting to find extortion. The organizations that use software, that have software developed for them, often feel that the software is of value only to them; it was custom-designed for their use; anyone else would have to go to such great lengths to modify it for their use that they feel it does not need protection and really would not be of use to anyone else. It turns out that it is of use to other people in some situations.

Here in Los Angeles, a small accounting firm, a medical clinic accounting firm, had their whole business dependent upon a set of accounting programs that they had hired a programmer to develop for them. After he developed the programs he took all copies of them, all the instructions, all the documentation, went off and hid in the San Bernardino mountains and called his employer, said he had all his programs and would not give them back unless he paid him $100,000. So programs, even though they are custom built for an organization, are of importance from the point of view of the use of the programs and far more important as to their use rather than who has a copy of the program.

They caught this young man after three days, but they impounded the programs in the sheriff's office for evidence and they did not understand what the program was; all they had was a bunch of punch cards. This little company could not function without the programs and so one night they burglarized the sheriff's office, stole the programs, made copies of them, and returned them to the sheriff's office without their knowing it.

The district attorney, by the way, decided not to file charges because he could not figure out how he could explain to a court the importance of these and the value of these programs and felt that he really did not have enough evidence to go ahead with a criminal indictment.

In two cases we have had people who collect programs from other organizations, that belong to other organizations, and then use them commercially. One was a professor from a French university that toured the United States going to various universities and large organizations and collecting software. He just asked everybody for all the software that they were willing to give him and he collected a large amount of it; went back to France; packaged the better software that he found and brought back with him; and went into business selling this software. He was indicted and I don't have, I am afraid, any more information other than the fact that he was indicted for fraud in that case in France.

In the other case, a blind man here in Los Angeles and his business manager went into business advertising openly for programmers to submit to him copies of programs from their employers and the willingness of the programmer along with it to modify and maintain the programs that he would then go sell on the open market. He had a fairly extensive business going getting programmers to take software from their employers' facilities and give it to this man and then provide their services to maintain the software. So there are two examples where there is commercial value in unauthorized acquisition of software.

You may have read recently of the Sideletz case, the programmer who worked for Optimum Systems Incorporated, OSI, that had the contract to provide exclusively all the computing for the Federal Energy Agency in Maryland. This man, by mutual agreement, left the employment of OSI, started up his own computer consulting and services business and got on his terminal --

and he knew the passwords and he knew the access to the OSI, FEA system, and proceeded to steal a piece at a time the entire operating system called "WYLBUR," for the computer system. Now, WYLBUR is considered a trade secret system by OSI. At the same time, it was developed at Stanford University and there are a number of copies of Wilbur that are available and in use in various places. At least there are versions that are in the public domain.

But this man, Sideletz, was convicted and is now serving a term in jail. He claimed his purpose in taking the software through his terminal in his garage at home was to demonstrate to his former employer and the FEA the vulnerability of that system so that they would hire him as a consultant to help them increase the security of the system. The prosecutor contended that it was his intent to steal the Wilbur program to cause a loss to OSI and possibly to market the system that he took -- or at the very least to use it for his own purposes in running his own computer.

Another case, again here in Los Angeles, a man named Mackie, a former employee of a milling machine company in Michigan, went to work for a machine tool company here in Los Angeles. He used a commercial time-sharing computer terminal and, knowing the method by which his former employer chose passwords, with a little experimentation he found the passwords used by that company in London over a telephone line to this country and he used these passwords to use $15,000 worth of time-sharing time. In the process of using this time, he claimed he was helping his former customers, customers of his former employer, who kept calling him for advice since they could not get any of the correct advice they needed from anyone that was left in the company in Michigan.

He also used a program experimentally, a highly confidential new, very expensive program developed by his former employer, but not yet put on the market for use by customers. He experimented with this program and used great amounts of machine time doing that. He told me the reason why he did that was that he was intent on purchasing the use of that program in a legitimate fashion as soon as he figured out how the program worked and whether it would be of benefit to his new employer.

The implication there was that it was very possible that what he was doing was testing this highly confidential program for the purpose of determining how it functioned simply by feeding input in and determining the results that came out from its use, and thereby gaining a significant competitive advantage from writing a program of his own.

He was indicted and, in fact, just recently convicted and got a suspended sentence. He pleaded guilty, but the prosecuting attorney -- one of the charges against him was forgery for obtaining goods and services. The assistant district attorney was going to attempt to prove that the typing of a password into a computer terminal constitutes a legal signature.

We are very unhappy about that case in that that issue was not tested, because, as I say, the man pleaded guilty. But that remains to be determined, the value of a password and legal signatures.

I could go on for hours and hours telling you about these cases. There is another one that is a civil case that is in litigation at the present time that is so complex that it would take me hours to tell you about it. It is the Select-A-Seat Company of Arizona that offers computer services of providing a reservation to entertainment events and this is a new service that has sprung up all over the country. The Select-A-Seat of Arizona is suing BASS, the Bay Area Selective Seating Company, and several other companies and several other people. It seems that the company that wrote the software that makes this service work, licensed the software to Select-A-Seat Company in Arizona and that people from the BASS Company in San Francisco, through an employee of Select-A-Seat, stole a copy of the software; removed the security provisions and secret identification provisions inside the program; and then used it for their own commercial use; and in turn licensed it to a half a dozen other companies. That forms the basis for this suit.

Along the line, BASS did hire a programmer for the purpose of developing the software for them to go into business. In the meantime, they got this program that is alleged to be stolen from Select-A-Seat and they gave that software to the programmer who then proceeded to develop the software for BASS and it was concluded that it would take at least two-man years to develop that software from scratch and he developed it in a matter of a few weeks. So the suit contends that although it was reprogramed, it used their program extensively in the reprograming process.

Just to conclude rapidly here, I would like to talk a little bit about the people that are doing these kinds of things, the situation in ethics in handling information.

JUDGE FULD: Mr. Parker, I understand you wrote a book, "Crime by Computer"?

MR. PARKER: Yes.

JUDGE FULD: It has been published?

MR. PARKER: Yes, it has. By Scribner's. A number of these cases are described in there in depth.

JUDGE FULD: How much does it cost?

MR. PARKER: Ten ninety-five.

MR. PERLE: How much to Commission members?

(Laughter.)

MR. PARKER: Unless you are a member of a professional society that is offering it for about eight seventy-five, or something like that.

In any case, let me just describe the perpetrators a little bit. I think there are some important insights there. This is based on extensive interviews with 19 -- well, 20, including Captain Crunch. He was one of the more recent people. Captain Crunch, John Draper, is the hero of the telephone freaks, the blue box heros. He is typical of the kind of subset of people that I am going to talk about.

The perpetrators are generally the people who have the skills, the knowledge, and the access to do these things. They are very young, intelligent, highly motivated; they are exactly the kind of people that a data processing manager would want to hire. They exhibit the Robin Hood syndrome very strongly and this comes from criminalogical studies of white-collar crime. Well, it is a variation of the Robin Hood. It is stealing from the rich and keeping it.

(Laughter.)

MR. PARKER: But it is the idea that these people differentiate very strongly in doing harm to people which is highly immoral to them and doing harm to organizations that they can often rationalize. Not only that, but they put the computer in front of the organization and it is the computer they are doing bad things to; the computer cannot cry or get mad or hit back and there is a great satisfaction and challenge in ripping off the computer system; so it makes it very easy, in computer environments, to rationalize their acts; primarily because it has never been done before so who says it is wrong?

One programmer said, "You know, I only changed two numbers in that whole system for two ten thousandths of a second. Now surely doing something for so short a time cannot really be very wrong." He was actually inflating two savings accounts to get passbook loans.

They exhibit the differential association syndrome; that is, the acts that these people perform often differentiate in only small ways from the accepted practices of their associates. It is the old game of a group of people working together and taking pads of paper today, pencils tomorrow, and pocket calculators the next day; each person reinforcing the other one, thinking it is very funny and there is nothing really wrong with it and everybody is doing it.

The young man that Susan Nycum described to you, Jeff Ward, who stole a program from the memory of his competitor's computer was caught in that trap. It came out in a civil case that programmers routinely were dipping into one anothers employer's computers and that it was an accepted practice to dial into your competitor's computer and fish around to see what you can find; try to crash the other guy's computer and get customer lists, copies of programs, and so on. It is generally thought that that is a fair game among programmers who work for computer time-sharing services. Now, it is hard for me to say that it is extensive and that it is common practice, but I have interviewed enough programmers to know that it does happen and it seems to be happening fairly frequently. It is claimed that this is reverse engineering; this is Ford buying a Chevrolet to see how it works. We claim that it is far more than that and much more serious.

But in any case, the perpetrators are able to justify their acts; they do not see themselves as thieves. They see themselves as borrowers and they see themselves as technologists who are deserving of all of the free computer time and software that they wish to have.

The computer field has developed -- and I have been in it 26 years now -- on the basis of a benign environment; that everybody is a good guy; we are all working for the same thing. They do not understand today that they are working in a hostile environment and that there are bad people around.

It has been common practice from the beginning of computer time that programs belong to the programmers who wrote them. It was part of my value system when I was a programmer in the fifties and sixties. The Share organization, the largest user group of IBM computers would not have developed the way it has and the technology would not have developed as fast as it had if their concept had not been very strong in the computer field. We also exchange programs, even programs worth hundreds of thousands of dollars, casually, personally, among programmers.

Five years ago I fired a programmer; he went to work for another organization; the other organization called me and said, "Hey, we have all of your wonderful programs here. Would you please send us the documentation so we can use them?" And feeling perfectly justified; it was a reasonable thing. When a programmer leaves his present employer he packs up all his materials, including his personal things in his desk, and all of his programs. They belong to him.

I did a survey -- the statistics of this are in my book -- of 50 programmers who are, I would say, very strongly professionally oriented; they are part of a professional society. I had a questionnaire that they filled out and I asked them questions about the ownership of software and the authorization to use computer time, and I got answers that essentially -- there was no pattern to the answers of whether they thought a particular act was ethical, unethical, illegal, okay, or, "I have done it." Most of them had done most of the things that I had asked. So in my experience what I have seen is this development of a concept that software is somehow free and is available for distribution.

A new hobby is developing like wildfire today, the development of computer hobby. You can buy a computer kit, a full-blown computer for about $600 today; a terminal will add quite a bit more; but for $1500 you can have quite a powerful system with a printer, a terminal, and so on, about the equivalent of what it took a full room to house in the late 1950's.

There is a great amount of software movement among the hobbyists. These people are often referred to as "systems hackers." This is a term best described by Joe Weizenbaum in his book, "Computers and Human Reason," a recently published book. Systems hackers are people whose total lives are dedicated to computer technology. They live, eat, sleep, and die computer technology. They are the kind of people that I have had to chase out of computer rooms because they go without sleep, without food, without going to the restrooms, beating away at their programs, through brute force getting their programs to run on the computers. They become addicted like a person who is addicted to gambling. System hackers believe that the computer world is theirs; it belongs to them. They have, in my estimation, at the very least, a very distorted sense of ethics about what belongs to whom.

We do a lot of work for a number of clients in computer security. We almost invariably will walk into a large company and find that the tables, the chairs, the filing cabinets all have little labels on them and numbers identifying that this is property of that company, but on a table like this, we will walk into the programing area and find decks of punch cards where the only identity is a felt pen scribbling of the programmer's name across the top. It turns out it is a program that costs something between seven or $800,000 to program and it is sitting entirely unmarked on a table in an area that, in some cases, we have proven, has had general public access. So large organizations that produce very expensive software, many of them have not recognized the fact that this represents extremely valuable assets to their organizations. The systems hackers perpetuate this concept of "software is free."

There is a thing that was developed, an ethic, called "The Peninsula Ethic," that came out of the Ward versus California case in the San Francisco Peninsula Area. The Peninsula Ethic -- well, it came out of expert testimony in the criminal case, a very well-known consultant and computer programmer in the field said on the witness stand that it was his belief that anything you can extract, any information, programs, or data, that you can extract out of commercial time-sharing systems is automatically in the public domain. He felt that that was a generally held value among he and his fellow consultants and widely held value in the computer field.

It is my contention, after seeing all of this and the computer abuse study that we are doing, that there are no formal ethical standards in the computer field, at least none that cover anything that is unique in the computer field.

I just received a grant from the National Science Foundation to conduct the first national workshop on professional ethics in the computer field. It will be held in January or February at Stanford Research Institute and half of the people attending will be people from the computer field, leaders in the computer field; and the other half will be philosophers from various law schools throughout the country who are identified and associated with ethical issues. The purpose is to determine if there really are issues of ethics that are new, are totally new, as a result of the advancing technology. I feel very strongly that as the results of the work and our goals in this area of the safe use of computer technology by society, that it is extremely important that we advance the concepts of professional ethics in the field and I am trying to do this through our professional societies.

Susan Nycum is working very hard trying to determine the inadequacy of the law relative to advancing computer technology and I believe that we have got to start with the day to day ethical practices of our own people in the computer field if we are going to make headway in developing adequate and appropriate concepts of software and computer-stored data ownership.

Maybe I better stop and let people ask some questions, or elaborate on any issues.

JUDGE FULD: Is there no way technologically of protecting the program itself?

MR. PARKER: No, there is not. Commercially available computer systems today are not protectable in any practical sense on a technical basis. We are doing research on the provably secure computer systems. They are computer systems that will be designed and implemented so that you could mathematically prove that they are secure, given a definition of a secure computer multi-access computer system.

JUDGE FULD: Can you isolate the programmer from the material he programed?

MR. PARKER: No. This is the concept of building electronic fences inside a computer system to separate programs and data. It can be done to the degree that the average computer applications programmer would have great difficulty in compromising the system, but the system would not be safe from a systems programmer who would have knowledge of the operating system of the computer.

Now, there are computers that are deemed to be relatively more secure than others. The Honeywell Multics System is generally conceded that the design of that very large multi-access system is secure. Among all the researchers in the computer security field, no one has been able to violate the system based on the design of the system. However, there is an Air Force team that has been weekly for three years compromising the Multics system. They do it by finding errors and shortcuts introduced into the implementation and in the maintenance of these large systems.

The serious aspects of the problem is that we do not know how to prove the integrity of a system over time on any practical basis. Therefore, we do not know how to determine what is in a computer system and the degree of integrity or correctness of what is in a computer system at a point in time.

MR. PERLE: Is that what "integrity" means? Correctness?

MR. PARKER: In this case, now, it means that the information in the computer system corresponds exactly to an agreed upon set of specifications and performs no more than the specifications call for.

We did a study on the feasibility of the certification of software at SRI. We did it on an NSF grant and concluded -- this was about a year ago; we finished this study since -- we concluded that there is no possibility of developing the concent of certification of software like Underwriters Laboratory would certify a lamp or some such thing because of the state of the art of software development. Programing is still a cottage draft and programs are works of art. However, we do see something on the horizon. We anticipate that we will have provably secure computer systems within eight to ten years. The next generation of computers will not provide it, but the generation after that it will be possible.

MR. PERLE: When you say "secure," what do you mean?

MR. PARKER: I mean that the system cannot be compromised by expending any less effort or resources than the value of the assets you store in the system. In other words, if you have $10,000,000 of assets stored in the computer system, one rule of thumb says that the system would be secure if it would cost you more than $10,000,000 to access this system --

MR. PERLE: Steal it.

MR. PARKER: -- than steal it.

MR. SARBIN: By $10,000,000, stored, you mean $10,000,000 worth of time, energy, whatever, is the cost that went into it?

MR. PARKER: That the system could suffer $10,000,000 in losses, I will put it that way.

MR. SARBIN: Not that it cost anything like that for --

MR. HERSEY: I am sorry. Are you finished with this?

MR. PARKER: Yes.

MR. HERSEY: In reading your report I saw that under the section "Possible New Legal Approaches," you referred to an advocacy by a number of people of a computer abuse act that would be --

JUDGE FULD: Usable.

MR. HERSEY: -- a feasible way of using this. Could you describe what that would be?

MR. PARKER: Well, only if you allow me the freedom of talking outside of my area of expertise since I am not a lawyer. I can quote Susan Nycum on this, my collaborator. We concluded that the commercial law is not adequate for advancing technology, especially as it is implemented in the 11 jursidictions that we did our study in, and concluded one of two things: Either the law should be amended significantly, or a new commercial code should be written, ideally, to free the law from dependence on technology, so that as the technology changes and advances the law is unaffected by that; it is invisible to advancing technology. I think that there is an attempt to do that. For example, in new proposed surveillance legislation to control eavesdropping electronic equipment, there are attempts to try to make the law independent of the technological capability to eavesdrop and that, ideally, seems to be the goal of this kind of thing. But at least me, as a layman, sitting in court listening to these trials involving computers, both civil and criminal, it is a very frustrating experience seeing the great effort of trying to explain the technology in such a way that it is addressable by an existing law.

MR. HERSEY: Have you had any cases in which a copyright law was directly involved?

MR. PARKER: None that I recall. I have 420 cases and I was just reviewing them briefly yesterday to find one like that and I have not found any. The ones that involved issues of the ownership of writings were predominately trade secret; there were several patent cases.

MR. NIMMER: Were there any on what is called a conversion theory?

MR. PARKER: I saw the word used in some of the hearing information and I do not really understand it, what you mean by "conversion theory."

JUDGE FULD: Are there others doing this work besides you: abuse?

MR. PARKER: No -- well, not very many. Brant Allen at the University of Virginia Business School, professor of accounting, is doing a similar study but not to the extent. It is a limited amount of study. So far, Susan and I really are the only ones There is a professor at the University of Freiburg in Southern Germany that is doing a study in Germany on the subject. We are the only ones here.

MR. LEVINE: We were contacted just this last week by a man at the FBI who is in their data processing area and they have recruits or field agents that were coming to the school at Quantico and they normally give them a course in criminal copyright infringements relating primarily to record piracy in motion pictures, but he thought we might be able to give him some insight into a discussion that he might hold with them on criminal copyrighters as it relates to computer programs. He had been involved in the Sideletz case, he said.

MR. KEPLINGER: If I may add to that, I also talked to him, and he mentioned that allegedly the copies of Wylbur that were taken bore a copyright notice, The prosecutors discussed bringing an action for criminal copyright infringement, but because of the uncertainty surrounding the whole matter, it was not seriously considered. They felt they had a much better case on the fraud by wire theory.

MR. PARKER: I did not see that in the court documents that I read, the copyright part of it. I have not seen them all yet.

MR. LEVINE: They chose not to go to copyright.

MR. PARKER: I have lectured at the FBI Academy on computer crime and the FBI is developing a significant training program to include computer technology. They have a computer there now and they are using it in developing courses around it so that their agents, especially their accountant agents -- and there are more accountant agents than there are agent agents in the FBI, police-type agents -- and so that the FBI is moving vigorously, although the FBI generally claims that they only know of half a dozen computer crimes. They define computer crimes very differently than I do. In fact, in speaking very carefully, I really should not even use the word "crimes," because crimes represent only a small part of what we are looking at.

MR. MILLER: Some of the things we heard this morning have a larger definition of computer abuse or might even constitute a copyright misdemeanor.

JUDGE FULD: Are there any other questions?

Thank you very much, Mr. Parker. We will have to read your book now.

MR. LEVINE: The Commission has a copy, by the way, if anyone wishes to borrow it on intra-library loan.

(Laughter.)

JUDGE FULD: We are going to go to the --

MR. NIMMER: Can we take a three-minute break?

JUDGE FULD: Sure.

(Recess.)

Los Angeles, California, Friday, September 17, 1976, 3:08 PM

JUDGE FULD: Let us go to the guidelines again. Do you want to talk, John?

MR. HERSEY: I think I penetrated the mystery of the horror. May I try it on you and see whether this sounds right?

MR. WEDGEWORTH: Is that the one on page --

MR. HERSEY: On page --

MR. WEDGEWORTH: -- two of the guidelines?

MR. HERSEY: Page 1 of the guidelines themselves, but Paragraph 2 at the foot of the page.

"In the event that," paragraph indented, "(a) a requesting entity shall have in force or shall have entered an order for a subscription to a periodical or," paragraph indented, "(b) has within its collection a copy or phonorecord of any other copyrighted work," then back to the left-hand margin, "material from either category of which it desires to obtain by copy from another library or archives" -- I will just read this off -- "another library or archives because the material to be copied is not reasonably available for use by the requesting entity itself," comma "then the fulfillment of such request."

MR. NIMMER: Could you read that part again? After the words, "copyrighted work."

JUDGE FULD: That sounds good.

MR. PERLE: I just wanted to make sure the librarians understand. They do not want to do it by interlibrary loan, that they may not be able to do it by interlibrary loan if it is available. That is what it says.

MS. WILCOX: If I may, that is what the ALA Code says, what the interlibrary loan has been doing for years, so the Commission is not saying anything moot.

JUDGE FULD: Do you want to read it again, John?

MR. HERSEY: Does that sound as if it makes sense?

MR. WEDGEWORTH: It makes more sense than the present version.

MR. HERSEY: I will do it again.

MR. PERLE: You have the (a) in the wrong place.

MR. LEVINE: Let me make sure that DeeDee is writing this down.

MR. HERSEY: "A requesting entity" --

JUDGE FULD: Do you want to start all over again?

MR. HERSEY: All right. Paragraph 2:

> "In the event that a requesting entity," paragraph "(a) shall have in force or shall have entered an order for a subscription to a periodical or" --

MR. LEVINE: Wait.

JUDGE FULD: Go ahead.

MR. HERSEY: "Or," paragraph indented, "(b)" -- both (a) and (b) are indented -- "has within its collection a copy or phonorecord of any other copyrighted work" --

MR. HERSEY: "Or (b) has within its collection a copy or phonorecord of any other copyrighted work." Then return to the left margin: "Material from either category of which it desires to obtain by copy from another library or archives." I guess we need the parentheses, "(The supplying entity"), end parentheses, "because the material to be copied is not reasonably available for use by the requesting entity itself," comma "then the fulfillment of such requests shall be treated as though the requesting entity made such copy from its own collection."

Then I believe that the "provided that" that we put in yesterday does not make sense. I think it should be a new sentence with "another material." It is simply an elaboration of what we have just said, a clarification of it. It is not a proviso.

JUDGE FULD: It will start with "A library"?

MR. HERSEY: End sentence at "collection" and a new sentence, "A library."

JUDGE FULD: The rest is as it is?

MR. HERSEY: Yes.

MS. DOUGHERTY: Could I read it back to make sure I got it, Mr. Hersey?

"2. In the event that a requesting entity (a) shall have in force or shall have entered an order for subscription" --

MR. FRASE: Pardon me. It is "a subscription."

MS. DOUGHERTY: " subscription for a periodical or (b) has within it's collection a copy or phonorecord of any other copyrighted work," and then back to the margin, "material from either category of which it desires to obtain by copy from another library or archives," did you say?

Parentheses, "(the "supplying entity")", close parentheses, "because the material to be copied is not reasonably available for use by the requesting entity itself," comma "then the fulfillment of such requests shall be treated as though the requesting entity made such copies from its own collection."

MR. PERLE: Would you go back out to the margin again? "Any other copyrighted work," out to the margin.

MS. DOUGHERTY: "Material from either category of which it desires."

MR. PERLE: "It desires to obtain"?

MS. DOUGHERTY: "To obtain by copy from" --

MR. PERLE: "By copy"?

MR. LEVINE: Yes.

JUDGE FULD: Do you need that? Is that redundant? The extra word "copy"?

MR. PERLE: No. Otherwise it is a straight interlibrary loan.

MS. DOUGHERTY: Would you like me to go on?

MR. LEVINE: No. I think that is good.

MR. HERSEY: There was one other thing. At the first line on Page 2 of the Introduction, I think it should be "in a periodical," instead of "in periodicals."

JUDGE FULD: First page?

MR. HERSEY: First line of Page 2 of the Introduction.

MR. PERLE: Correct. As a matter of draftsmanship, in the guidelines themselves, should "guideline" have a capital "G"?

JUDGE FULD: You mean in the title?

MR. PERLE: No. In the guidelines themselves, should the word "guidelines" be a capital "G" each time? Do not kill me, Hershel.

has ordered a copy of such work and wishes to have copies and portions of that work supplied to it on an interlibrary loan?

MR. PERLE: They do not own it until it is in their possession. The title has not passed yet. Nobody is going to worry about it.

MR. WEDGEWORTH: What I am trying to get at is that it seems to be another part of No. 2 which has been deliberately left out.

MR. PERLE: We deliberately omitted the ordering of a book or a collective work or anything other than a periodical because frequently it is not practicable to enter an order for that sort of thing.

MR. WEDGEWORTH: That is no more true of a book than it is of a periodical.

MR. LACY: I agree with Bob on that.

MR. WEDGEWORTH: It is less than true.

MR. PERLE: How can I enter an order for a book which you no longer have in inventory but it is out in the store?

MR. LACY: But assuming a copy of the book --

MR. PERLE: You write back and say, "McGraw-Hill regrets that it does not have it available; however, you can go to Doubleday and you can get one"?

MR. LACY: No. We write back, "It is momentarily out of stock but we will supply it on such and such a date." If it is a magazine, we say, "We will enter your subscription and you will get your first one in six weeks," or we would say, "It is out of print."

MR. WEDGEWORTH: How do you order a subscription for a journal that ceased publication last month?

MR. PERLE: You do not.

MR. WEDGEWORTH: Right. And that is a purchase under the second category and what I am saying is that has been left out and it seems to me a significant omission.

MR. PERLE: I think you are better off. The librarians are better off if they do not have that because if you do not have that business of entering an order you go ahead and make five copies. No matter what you can make up the five copies. You have a guideline for that. You do have and it is thrown back into 108, generally.

MR. WEDGEWORTH: Why do you have that in there for the other categories, then?

MR. PERLE: Because the guidelines are supposed to define what is a substitute for a subscription or a purchase. But once again -- we went over all this before, Bob.

MR. WEDGEWORTH: No, we never went over this point.

MR. NIMMER: We did briefly yesterday. The publishers made that point at our meeting last week.

MR. WEDGEWORTH: I never went over it, is what I am trying to say. You may have discussed it with others, but never with me.

MR. NIMMER: Briefly yesterday, but only in passing.

MR. PERLE: The publishers said it simply was not practicable.

JUDGE FULD: Do you think it is critical, Bob?

MR. WEDGEWORTH: But I spend my life ordering books, which I think is, to me, a very significant omission. What we are talking about is, in this section, as it presently stands, as providing the opportunity to obtain copies of works where you have entered a subscription or have ordered it under the same circumstances as you would if you actually physically had it in your possession. This can happen just as easily with other kinds of works because, as you said yourself, you cannot order a defunct journal. It really becomes, in a sense, a collected work because you are buying a back issue under special circumstances.

If you originally subscribed and the firm went out of business or ceased to publish that, and for some reason that copy is not available to you, what protection do you have to --

MR. HERSEY: There is one difference, Bob. If you were ordering a current periodical, though there may be a delay, you eventually get it. But if you order a book, you may or may not get it. You must know that.

MR. WEDGEWORTH: There is no difference.

MR. HERSEY: Yes, there is.

MR. WEDGEWORTH: No, there is not. In fact, I would demonstrate to you clearly that your chances of getting the book are a lot better than getting the back issue.

JUDGE FULD: What harm is there in putting this in?

MR. LACY: 108(g)(2) is copying that substitutes the purchasing of the book and if the purchasing of the book is impossible for photocopies -- I really do not -- I think this would be a most rare and exceptional case that --

MR. WEDGEWORTH: It is most frequent. It is most frequent. It is probably the single-most frequent case for replacement that ever happens.

MR. LACY: You are saying a different thing is frequent from what I was saying was rare. I was saying it is rare that you weren't to get a book that you ordered.

MR. PERLE: Do you want to put it back in? It is all right with me.

MR. NIMMER: I do not care at all. But one difference is maybe that on periodicals we are only talking about in the last five years and hence they are not likely to be defunct; whereas books --

JUDGE FULD: What harm is there in having it in?

MS. WILCOX: I think there are two areas. It is hard to explain the problems. That is, the amount of claiming that is required -- maybe this is the postal system -- of the number of journal issues that are not received, it is horrendous.

JUDGE FULD: What harm would there be, I repeat, in having it in?

MR. NIMMER: We have to go back to the publishers, I guess.

MR. WEDGEWORTH: I raised the question because either I would like to see it in there or see some logical explanation for leaving it out.

MR. PERLE: The only explanation was that the publishers, guys like Alex Hoffman, have said it was not practicable and everyone said, "All right."

MR. WEDGEWORTH: Why isn't it practical? I have not heard anything that relates to my experience in terms of frequency.

MR. NIMMER: Bob should know more about ordering than Alex, I guess.

MR. LEVINE: They said -- and I am not sure that I understood -- that you do not place an order for a book. I am not sure I understood them, but that it was they said.

MS. WILCOX: You do not place an order for a book? What do you do? How do you get books?

MR. LEVINE: Isn't that what they said?

MR. NIMMER: Yes. I did not understand that, either.

MR. LEVINE: I am glad you were there, too.

MR. PERLE: Then after the words, "copyrighted work," on Page 2 --

MR. HERSEY: Wait a minute. Let us see what the language should be.

Let me say one thing: I would hope we can settle this this afternoon as far as possible because we are not going to be convening again before a week from Monday when this has to be ready for the conference committee and we have done a lot of work on this and I am willing to call Irwin in ten minutes now and check out --

MR. NIMMER: This was not a point that Irwin made. It was a point, I think, that Charles made.

MR. PERLE: Irwin did not care.

MR. WEDGEWORTH: This one question that I have had even before I got out here, questioning why there was not a complete parallel here. I do not understand it.

JUDGE FULD: Why should the publishers object?

MR. PERLE: I have no idea.

MR. LACY: I have no --

MR. LEVINE: The only possible situation in which they would object -- and I do not know how you distinguish it from periodicals -- is if, in fact, they know -- I use this as a hypothetical; I do not think the librarians would do this -- but if the article is out of print, merely writing to the publisher and ordering it, then --

MR. LACY: Out of print you have another whole category.

MR. LEVINE: Or that the publisher is defunct.

MR. LACY: You have got all of that on periodicals.

MR. LEVINE: That is right. I understand.

MR. FRASE: More definitely in periodicals that it is defunct.

MR. LEVINE: I cannot believe that the publishers association is going to --

MR. WEDGEWORTH: That is not even the most frequent category. You see, if you have a defunct journal -- which is extremely frequent -- new journals go out of business almost immediately, then there is no way you can enter a subscription for it. If you subscribe from the beginning and somehow misplaced or lost your copy, I am saying that would not fall under the first category where you are talking about entering a subscription; it would fall under the second category where you are simply buying a collected work because it is no longer a subscription.

MR. PERLE: The language, if it goes in, would be "or (b) has within its collection," comma "or shall have entered an order for," comma.

Arthur, the language, if it goes in, would be: "or (b) has within its collection," comma "or shall have entered an order for," comma. Arthur, you make sure that DeeDee gets all the commas.

MS. DOUGHERTY: "Has within its collection" --

MR. WEDGEWORTH: Comma.

MR. LEVINE: "Or shall have entered an order for," comma.

MS. MORRISEY: "Or shall have entered an order for."

MR. LACY: I can see no problem from the publishers but I can see there might be out of --

MR. HERSEY: I think we have to check it back with them.

MR. LEVINE: I think --

MR. LACY: Incidentally, on the time, let us get one thing straight. Brennan had said he will accept anything that all the parties have agreed. I think we could have a situation in which the Commission here said that any of the variations in this that all the parties agree to is all right with the Commission and the authors could say if we did leave any unfulfilled minor points.

MR. LACY: Anyway, we do not have to vote on it again if anything in this satisfies us and the parties all agree.

JUDGE FULD: Do you want to listen to a draft that Arthur has drawn?

MR. LEVINE: According to Hershel's suggestion, I simply scribbled this down: The following guidelines were adopted by CONTU as its meeting on September 16 and 17. They represent the result of a series of discussions by the Commission based upon written and oral presentations given by the major interested parties. We believe that these guidelines are fair and workable and represent a compromise position that the parties can subscribe to.

Because CONTU will not be meeting again before Congress is expected to enact the new copyright law, this draft must, of necessity, be the final draft of CONTU of these guidelines.

We hope that the parties agree that the adoption by Congress of reasonable guidelines for inter-library photocopying is desirable for both the author-publisher and library communities. We therefore ask for your final approval of these guidelines before they are transmitted to Congress.

MR. HERSEY: Send it to the parties?

MR. LEVINE: Yes. Maybe just read over the phone by you all.

MR. PERLE: The word "compromise" bothers me. It is a draft which mutally accommodates all the parties.

MR. LEVINE: Fine.

MR. MILLER: Congress is not adopting.

MR. HERSEY: Irwin did have one other point and we had a discussion here briefly that --

MR. MILLER: Congress does not adopt.

MR. FRASE: The conference committee puts it into a conference committee report to --

MR. NIMMER: It depends on what they say when they put it into the conference committee report, but notice what they said on the 107 guidelines.

MR. HERSEY: Mr. Chairman?

JUDGE FULD: Yes.

MR. HERSEY: There is one point that I have undertaken to talk to Irwin Karp about this and he is active and he had one point that he wanted to make. Paragraph 3, "No request," and so on. He accepted the language up to the end but wants to add "And whether it is making the request under Paragraph 1 or Paragraph 2 above."

MR. PERLE: Why, John?

MR. HERSEY: The reason for that is for the record keeping of the borrowing library that it is essential that it be clearly indicated whether they are borrowing under the five-copy limit or under (b) which is where they have a copy and copy under in-house rules.

MR. LEVINE: That is one and two.

MR. HERSEY: One and two. I am sorry. One and two. Not (a) and (b).

MR. PERLE: John, I respectfully submit that if that provision should be in at all it ought to be in Paragraph 4. It is not the business of the lending entity or the concern of the lending entity.

MR. HERSEY: I will try that on Irwin. I think that he feels very strongly it should go in the request.

MR. WEDGEWORTH: Let me first respond to that practically.

MR. HERSEY: Let me ask you how the request is made. How does that go?

MR. WEDGEWORTH: That is what I was trying to get at. Normally, when this kind of transaction takes place, you fill out this form. Let us assume the form completely identifies the item. Now, addressing the question as to whether it is Category 1 or Category 2, let us also assume that their file is kept in some order, otherwise you would never be able to tell how many copies you got from any given item during a given year. It really does not make any difference whether you say Category 1 or Category 2 because if you have got all the slips together and if you have exceeded five, then they are going to have to demonstrate that they have a copy of the item in order to justify their having eight copies from a given work or a given journal during that given year; correct?

MR. HERSEY: But isn't it true that if they --

MR. WEDGEWORTH: What I am saying is, marking it on the form does no more because you can count them and see that. Even if they mark it on the form, they are still going to have to demonstrate if an audit takes places that they own the copy; correct? So that additional marking does not really help you that much.

MR. HERSEY: So they would have to be able to demonstrate the dates which they had entered the order for the copy.

MR. WEDGEWORTH: Possibly.

MR. HERSEY: See whether that corresponds with --

MR. LACY: They would be able to do that. The ordinary acquisition records would show that.

MS. WILCOX: It relates to one other thing, too, and that is how the requests are transmitted. If the requests went by telephone or if they went by TWX, that is your record. It seems to me it is appropriate in the requesting library; that is where the burden ought to be because that is the only place where the record is meaningful. But in order to put all this other additional information on; it is redundant.

MR. HERSEY: Alice, when a request is made by telephone or Telex, is that not followed by a form?

MS. WILCOX: No. The Telex or the TWX is not the only order that is appropriate.

MR. HERSEY: A telephone call is sufficient to --

MS. WILCOX: For many libraries, that is sufficient.

MR. PERLE: May I suggest --

MS. WILCOX: I think it is the appropriate place for these records to be kept and the only place where they can appropriately be kept in lieu of subscription is with the borrowing library, not with the lending library.

MR. HERSEY: Are you saying that there are many cases where the only transaction is the telephone call from the borrowing library to the lending library saying, "We want such and such a copy of such and such"? Is that not followed by a form?

MS. WILCOX: There are many libraries -- I cannot respond to how many -- but, yes, there are libraries where the entire thing is by a telephone call; but there are many, many more where the entire message is on a TWX. Now, the appropriate place to keep those records is in the file and the reason I am saying this is just a logistic thing. If you try to file TWX requests, it just is not appropriate anyway because it is appropriate that the file that you want to keep for the records, the records that the person has filled out at the time of request --

MR. WEDGEWORTH: That is not impossible. I think we are getting away from the question and the question is that it seems to me that it is unnecessarily redundant because it does not give you any more information than you can get from looking at the file.

MR. PERLE: May I suggest that inasmuch as it has become evident that many of these requests are oral communications, that if we say in Paragraph 4, "The requesting entity shall maintain records," instead of "retain copies," of all requests. Then --

MR. FRASE: Yes.

MR. PERLE: Then you have the whole thing, John. Because the record necessarily reflects the basis upon which the request was made.

MR. LACY: You are already required to maintain records until the fulfillment of a request, which is all you need, because an unfulfilled request is irrelevant anyway. So you could --

MR. SARBIN: I think you should accept this because it is in part my contribution. When he asked me I said, "Okay."

(Laughter.)

MR. PERLE: "Maintain records of all requests made by it."

MR. WEDGEWORTH: "Filled requests" or "all requests"?

MR. PERLE: And then it goes on to say, "And shall maintain records until the fulfillment of such requests." That word "request" should be "requests" in the fourth line.

Dee, got it, kid? "The requesting entity." Substitute the words "maintain records," instead of "retain copies."

In the fourth line, the word "request" should be "requests."

MR. LEVINE: Excuse me. I forgot a --

MR. LACY: Are they really in need of a record of unfulfilled requests and not just the fulfillment of the requests? It is only the fulfillment that you need a record of.

MR. WEDGEWORTH: It has to be done anyway. If you ask someone for something you have to be able to identify it when it arrives.

MR. LACY: If you are willing to do it, I am certainly not going to --

MR. WEDGEWORTH: It has to be done; it is not an option. If you get the item and you do not know who it goes to --

MR. PERLE: You have to be neat in draftsmanship. After "requests" you can say "which records." Strike "copies of requests," then.

MR. PERLE: "Which records shall be maintained."

MR. LEVINE: May I make another suggestion for a minor, very minor change in the introduction? This was suggested by John Lorenz. I am sorry I did not call it to your attention yesterday. But he asked that in the first line of the last paragraph of the introduction that the word "system" be changed to "practice"; "system" being a bit of a buzz word.

MR. PERLE: First word of what?

MR. LEVINE: The first line in the last paragraph of the introduction. "The point has been made that the present system of interlibrary loan." Can we change that to "practice"? Does that offend anybody?

JUDGE FULD: Third line, too.

MR. LEVINE: No. "System" is correct there.

MR. SARBIN: If you do that, you have to say "interlibrary loans," not "loan."

MR. LEVINE: Thank you.

MR. LACY: I wrote that paragraph so let us not tinker too much.

(Laughter.)

MR. LEVINE: On the second line, "use of photocopies," instead of merely "photocopies."

MR. WEDGEWORTH: Second line?

MR. LEVINE: Yes. Okay?

JUDGE FULD: What about No. 5? Do we leave out the last sentence? Have you omitted that?

MR. LEVINE: I think we decided we would leave it in.

MR. HERSEY: What is that?

MR. WEDGEWORTH: Five of the guidelines.

MS. MORRISEY: It says CONTU won't be alive.

JUDGE FULD: I thought we ought to take it out.

MR. LEVINE: Are we through with the guidelines?

JUDGE FULD: No. I want to know about the last sentence.

MR. LEVINE: I thought we had decided yesterday that the last sentence --

MR. WEDGEWORTH: What last sentence?

MS. MORRISEY: Page 2 of the No. 5.

JUDGE FULD: No. 5.

MR. WEDGEWORTH: I thought we had decided that we would revise that to reflect 108(i).

MR. LEVINE: I thought we had decided to not change it at all simply because there was no point in changing it.

MR. LACY: I do not agree with it.

JUDGE FULD: I do not like it at all.

MR. LACY: I think it is presumptuous and arrogant of the Commission to tell Congress that we may review it five years from now. I have some revised language which would say: "Five. As proposed in Section 108(i), these guidelines shall be reviewed not later than five years from the effective date of the enactment of" -- since it is going to be in a report on this bill, you could say, "of this bill," or "the general copyright provisions."

MR. FRASE: "This bill for the general revision."

MR. PERLE: Well, we are down to the wire.

MR. LACY: 108(i) requires exactly what we are saying; it is not even optional. It specifically requires it.

MR. WEDGEWORTH: I agree with you, Dan. I think it is very presumptuous.

MR. LEVINE: Drop the last sentence? Fine.

MR. LACY: Particularly when you have no statutory --

MR. PERLE: I move we unamimously --

MR. HERSEY: How is the first sentence on Page 5?

MR. FRASE: Starting with "as provided in Section

108(i) these guidelines shall be reviewed not later than five years" --

MR. LEVINE: "From the enactment of this bill."

MR. FRASE: -- "after the effective" --

MR. LEVINE: "From the enactment of this bill."

MR. PERLE: Not "after"?

MR. NIMMER: Of course, (i) does not call for a review of the guidelines; it calls for review of the Statute.

MR. LACY: It requires a review of everything referring to interlibrary loans and the Statute actually has meaning as interpreted by the guidelines.

MR. NIMMER: I agree it is logical to do this but when you say "as provided in 108(i)" it is not, strictly speaking, correct.

MR. LACY: Except that these guidelines are only relevant to the legislative gloss on the Statute. It is an integral part of the Statute as required by the courts.

MR. HERSEY: I think you are going to get a howl from Irwin on that. Why not leave it the way it is?

MR. LACY: I really think that is wild. That is nonsense.

MR. HERSEY: It is nonsense to you, Dan, but it is not nonsense to him.

MR. LACY: It is nonsense.

MR. HERSEY: It is not nonsense to Mel.

MR. NIMMER: It does not bother me, I must say, but strictly speaking it --

MR. LACY: I have no objection to the guidelines but one thing I object to is to say that -- I would be glad to say "As a part of the review provided in 108(i) these guidelines will be reviewed."

MR. HERSEY: That is all right.

MR. WEDGEWORTH: Won't you recommend that these guidelines be reviewed if you construed that it is not a part of your 108(i)? Remember that this has been included in the review mandated by 108(i).

MR. LACY: This is the Congress saying this now; not us saying it.

MR. WEDGEWORTH: But I am saying CONTU is saying what is in 5.

MR. LACY: Well, CONTU is suggesting the conference reports should say it.

MR. WEDGEWORTH: Yes.

MR. LACY: This is language we are providing --

MR. WEDGEWORTH: I see. How would that go?

MR. LACY: "As a part of" --

MR. FRASE: "Review provided in section" --

MR. LACY: "Of the review provided in Section 108(i), these guidelines shall be reviewed not later than five years after."

MR. FRASE: The Congress is saying this. Shouldn't you say "will be"? They have already provided it.

MR. HERSEY: How does the sentence end now?

MR. LACY: "Five years after the enactment of the general revision of the copyright law." What it leaves out is saying that it may be done by us or by the Register of Copyrights, since the last specifically requires the Register of Copyrights to make such a review.

MR. WEDGEWORTH: So you dropped that last sentence?

MR. PERLE: How does it read now?

MR. LACY: "As a part of the review provided in Section 108(i), these guidelines shall be reviewed not later than five years after the effective date of the enactment of this bill."

MR. PERLE: Then you should say, "should be reviewed," instead of "shall be."

MR. FRASE: Or "will be."

MR. NIMMER: Are we speaking for ourselves or for the committee?

MR. LACY: We said "shall" and "will" throughout the rest of it.

MR. PERLE: You are talking about a review by somebody else.

MR. LACY: This is Congress speaking now.

MR. PERLE: You are right.

MR. NIMMER: It is not really Congress; it is the committee.

MR. LACY: The committee does not feel any embarrassment about that. If they do, they will change it.

- - -

MR. PERLE: I move the adoption of the guidelines in the form in which we all understand them.

MR. LACY: Whatever that may be.

JUDGE FULD: I do not think anyone disagreed. The motion is carried.

MR. LACY: Are you going to call Irwin now with this change?

MR. HERSEY: I do not know. How do we leave this?

MR. LEVINE: I think it can wait until Monday because I do not think that Alice and Bob want --

MR. PERLE: You will have to get a statement.

MR. HERSEY: The issue is, we do not reconvene; there is not going to be a convenient time to get us all together.

MR. LACY: I think we could adopt these with the provision that the staff can insert amendments that may be jointly agreed to by all the parties.

MR. HERSEY: Supposing that there is some sticky point for one of your group or a sticky point on this side, then how do we resolve that?

MR. LACY: I think you have a couple of things: One, if it is a trivial kind of easily resolved point, you get on the phone with that if you anticipate the other side will accept. Either you get on the phone or Arthur does. If it is a substantive disagreement, I think we simply report to Brennan we have adopted these recommendations but they have not been agreed to by whichever side did not agree to them so we cannot --

MR. FRASE: Should we specify it is agreed to except for this point?

MR. PERLE: No.

MR. LACY: No. I think we should say it is agreed to except by this organization.

MS. WILCOX: The introductory statement that Arthur read covers that.

MR. HERSEY: That is a letter to the parties.

MR. SARBIN: You are going to get into a discussion about what is trivia and what is substance.

MR. LEVINE: Absolutely. What is going to happen is Dee is going to be sitting at the typewriter at 8:30 a week from Monday morning and we are waiting for the last word to come in. I think we have to --

MR. SARBIN: I am in favor of saying, "We have had it." I really am. You have done it; you have considered it. If they want to change more and play around with it, let them talk to somebody else.

MR. PERLE: Arthur's statement, as said, this is necessarily the last draft. I suggest that you add one last sentence to that which says that, "If you take exception, feel free to write the Congress" or "the committee."

MR. LEVINE: That is gratuitous. They can do that without our permission.

MR. SARBIN: Let us not add anything.

MR. PERLE: As far as I am concerned, I am with Hershel, I am through with this.

MR. WEDGEWORTH: I think we have reached the point where we have to decide whether we think we have done as well as we possibly can and it is quite likely that some of our people will say that they do not like this. I also think that they are sophisticated enough to know who to write to in case they do not like it. But I think in conveying that impression to me, my response is, "Well, you know that it is easier to kill a provision than it is to get one adopted." If you want to assume the responsibility for not having any guidelines, that is a possibility. But we have done the best that we thought we could do in coming to this conclusion.

MR. LEVINE: This is very important for my purposes and for what Judge Fuld, in a letter to the House and Senate Judiciary Committees, what he says, that is why I need reactions back whether we can say to the committees, "The major interested parties have agreed to the adoption of these guidelines." We are going to have to hear from --

MR. NIMMER: I think what you say to Congress, to the committees, is whatever the fact turns out to be; that is, either there is general agreement; there is agreement except for such and such a party; whatever. But let me add, I think it is important even if there is a failure of total agreement by all the parties that you should so forward to the committees what these guidelines are and state as accurately as you can who agrees to it because Brennan may not ultimately go to the point that will incorporate only if there is total agreement.

MR. LEVINE: I agree with that. What I am saying is, though, I need input back from, I guess, Alice.

Are you the one that is going to be on the firing line?

MS. WILCOX: I think so.

MR. LACY: It depends on what you mean by "totally." If the ALA, the ARL, the Special Libraries Association all agree to this but the Music Libraries did not, I think he will not call for a total in that sense, would he? I think by "total" he really means both sides, the substantial interests on both sides. I do not think he necessarily means every person.

MS. WILCOX: Arthur, could you read that statement again?

MR. LEVINE: Dee is typing it.

JUDGE FULD: Is there any other thing that we have to take up?

MR. LEVINE: Yes. You mean apart from the guidelines?

JUDGE FULD: Yes.

MR. LEVINE: The staff would like to move at the next meeting to photocopying and perhaps alternate sessions on photocopying data bases just in terms of the preparation of meetings, and it is useful for our purposes. I think it is time -- we decided to hold up on hearings of photocopies until the bill was passed or was not passed and we will know that, certainly, in the next week or two. That is one thing.

Two: I would like to mention a couple of projects that we are involved in.

MR. LACY: Before you leave photocopying, there are two sorts of areas here: One would be whether this should be an amendment of the presumably about to be adopted law and since the law itself provides for a five-year review of a rather extensive and thorough sort, it would seem to me to be relatively pointless to undertake recommendations to the Congress of an amendment of the law before it has been granted. So the main thing on photocopying that has really been left up to us, isn't it, is the question of the guidelines or clearing house arrangements, or whatnot, on photocopying that it is agreed requires the permission of the proprietor but where the circumstances are such, an ordinary case by case, item by item, transaction by transaction negotiations. Is that what we are really going to be talking about?

MR. LEVINE: I think largely.

MR. NIMMER: There are other things, too.

MR. WEDGEWORTH: I hope not.

MR. LACY: What other things?

JUDGE FULD: Bob?

MR. WEDGEWORTH: I hope that is not the focal point for our discussions. I think I would like to see us go to a more fundamental level of dealing with this question of photocopying similar to what Arthur Miller was beginning to articulate yesterday. I, for one, would resist simply trying to look at this problem in terms of agencies and mechanisms that we can presently foresee as being able to carry out this activity. I think that it would be much preferable to look at what the compensable uses of copyrighted works ought to be and then moving from there in which you might have many different patterns for that occurring rather than clearing houses or what have you. To me, I would like to start at the fundamental question and not start with the practical manifestations of it.

MR. NIMMER: I agree with Bob's remarks but, beyond that, aren't we putting the cart before the horse by trying to decide, first, what are the issues we are going to address? Shouldn't we first get the information? We have not had any input into the area of photocopying such as we have had in the computer area. Let us be educated in the whole area and then decide what areas we should attack and the nature of the attacks.

MR. LACY: What is the schedule for the completion of the studies we have --

MR. FRASE: Most of them are not going to be completed until next spring, where both our own and those -- like the input study and so on.

MR. LACY: I certainly am for -- I hope to get involved in it earlier -- the comprehensive review of the whole thing, a view to establishing really long-range policies. To some extent I think CONTU has been boxed in on this and the law has been passed and Congress has said, "Five years from now we want this reviewed to see if it works and what changes are to be made." I think it may be relatively fruitless for us to come in with a report a year from now -- and maybe not -- I would be sort of perfectly willing to consider doing it more -- to do that fundamental job, I think we certainly need to be informed, as Mel says, but the mechanisms we have set up to inform ourselves in some detail in order to produce a report.

MR. WEDGEWORTH: I think there is a lot of information presently available that will be very useful for the Commission to have. I have heard John and others comment quite extensively on what has happened vis-a-vis the arrangements with the British Lending Library. I say, let us get Morey here and have him present his information and you can ask those questions directly as to what the nature of this activity is. Let us get Gordon Williams at the Center of the Research Library to come before us and we can interrogate him directly and have him present the statistics on their operations, since these seem to be controversial areas of activity.

I think there are a couple of things that we can do pending the availability of the other studies that are in progress.

MR. LEVINE: Fine.

MR. HERSEY: I think we also have to think of this in longer range terms, too. Going to the fundamental question Peter Weiner raised the issue today whether computer copying and photocopying aren't going to merge.

MR. MILLER: Indeed, the uses of compensable uses and how you use them crosses both technologies.

MR. WEDGEWORTH: Yes.

MS. WILCOX: We need some of the vendors to come or some of the technologists to come.

MR. NIMMER: We do.

MR. LACY: In any event, just politically, we need to have all their testimony, whether we can functionally do much with it or not -- I do not disagree.

MR. LEVINE: I think, just again, as a political matter, though, that at the first meeting perhaps we ought to hear from the major associations who have been involved in photocopying problems; the AAP; the Authors League --

MR. PERLE: No.

MR. LEVINE: -- the ALA, ARL.

MR. PERLE: No, no. We have heard from them over and over again.

MR. LEVINE: Congress has heard from them.

MR. PERLE: Let us get the technologies.

MR. NIMMER: We can go back to them later.

MR. LEVINE: Technology is, in some cases, easier.

MR. LACY: Will we, though, specifically tackle this clearing house situation? I do not look forward to doing that.

MR. HERSEY: It is not a clearinghouse.

MR. LACY: Well, I was using that for shorthand to mean the sort of things --

MR. NIMMER: This microfilm thing can bear on that, Dan. Our photocopy subcommittee met the other day and I think there are some possibilities.

MR. FRASE: The problems are some of these things are not going to mature on university level.

MR. LEVINE: Let me just tell you about a couple of studies that we are funding. There was a study done in 1968 on the cost of the interlibrary loan and it was found that, interestingly enough, at something like 5.6 for a

$20 subscription, it became uneconomical for the library to request copies rather than subscribe to the book. It is interesting.

We are now funding an updating of that done by the people who did the original study and the results of that will be available February '77.

We are also funding, very modestly, a round-table discussion at Princeton Educational Testing Center October 12 and 13 organized by the National Inquiry into Scholarly Communications, "Ed Booher's group." That is the shorthand. At that, many of the groups who have been involved in the areas that we are concerned, the NCLIS photocopying study, Indiana University Group, the Machlup group, the Baumol group, will get together and discuss ways that their studies can perhaps fit CONTU's needs. Any Commissioner --

MR. PERLE: When?

MR. LEVINE: October 12 and 13. Any commissioner who wishes to attend, please let us know so that we can make the necessary arrangements.

MR. WEDGEWORTH: The 12th and 13th?

MR. LEVINE: October 12 and 13. Educational Testing Center.

MR. NIMMER: When is our next meeting?

MR. LEVINE: Our next meeting is October 21 and 22 and that will be in Washington.

The meeting in November, I believe, is November 18 and 19 and I think we will have that in New York.

MRS. DOUGHERTY: Did you change the dates?

MR. HERSEY: November --

MR. LEVINE: 18 and 19.

MR. WEDGEWORTH: I am going to have to miss that one, probably.

MR. PERLE: October 21 and 22?

JUDGE FULD: 21 and 22.

MR. LEVINE: Isn't that what we had originally said?

MR. FRASE: Thursday and Friday.

MR. LEVINE: Are Thursday and Friday still -- we are scheduled through the end of the year on Thursdays and Fridays.

MR. MILLER: Do you have one December or none in December?

MR. LEVINE: We do have one in December and, I believe, it is the 15th and 16th, but do not hold me to that.

MR. FRASE: The 16th and 17th are not Thursday --

JUDGE FULD: 18 and 19.

MR. LEVINE: I am sorry. I am in 1977. 18th and 19th in November; 16th and 17th in December.

MR. PERLE: Do we really want to do that?

MR. LACY: I think we are going to need one.

Arthur, if we are going to have the October meeting devoted to photocopying, November will be the next meeting in which we return to --

MR. LEVINE: Data bases.

MR. LACY: -- to the computer terminal base. My own feeling is that, having given this a great deal of thought, that we may be closer than I would certainly have thought a few months ago to formulating at least a first draft effort at some language on at least several, some of the four basic computer questions: Protection of programing; protection of data basing; the question of the entry into computer data bases; and the copyrighted and literary work and the copyright statutes of the work, quote created unquote by a computer.

I think we have reached or will have by November reached a point of diminishing returns and further sort of discussions of the state of their order and computer things unrelated to the specific questions.

What I would hope would be possible before the November meeting would be that the staff, in consultation with the several subcommittees that are working on this, could have prepared a draft of what would go to Congress, including presumably both some recommended statutory language and some explanation. Perhaps alternatives of two or three different pieces of statutory language which could have been sent out to the potential witnesses for the November 18 and 19 hearing so that we could be getting comments on those jobs -- not necessarily entirely by witnesses who come in here, but written comments by other people. I think that is the only way we will start to bring the question into focus.

MR. HERSEY: It would have to be alternatives.

MR. MILLER: Issues and options.

MR. LACY: I think these would not be things that the Commission has yet approved. "These are things on which the Commission wants your response: Would this work? What is wrong with this? What is right with it?" Those could have been drawn up before the October meeting in at least a first draft and perhaps we could reserve a couple of hours at the October meeting to take a look at those and, of course, the subcommittees involved would have been working on them anyway, so we could see whether they were in good enough shape to send out for comment. Surely we would not want to represent them as in any way Commission recommendations at this time, but I think it is going to be very hard to come to grips with the issue until we get it down on paper.

MR. PERLE: I just wanted to make sure nothing will be circulated unless the Commission as a whole, has said, "Circulate it in the way of the draft." Is that right?

MR. LACY: No. I do not think that is necessarily right. Certainly nothing would be circulated without the permission of the Commission as a whole but I think the

Commission as a whole might, having looked at some preliminary drafts, tell the staff, "You and the subcommittee refine this and go ahead and send it out."

MR. PERLE: This first draft inertia is almost impossible to overcome.

MR. LACY: Certainly I am not suggesting anything go out that the full Commission would not have wanted to go out. I think what we would be talking about then would be the November meeting before we voted on sending it out even for comments, without having had any outside comment yet, and then we would be well into next spring before we go to the outside.

MR. LEVINE: May I ask whether instead of full Commission approval whether we did not deal with the subcommittees because it is just very difficult.

MR. PERLE: Unanimous vote of the subcommittees.

MR. HERSEY: Yes. Let us be sure that these are options; not drafts of recommendations because we have not really discussed some of the fundamental issues yet.

MR. WEDGEWORTH: I think that I share that opinion, perhaps not for the same reasons. I think that we have got to get over the first hurdle, as Dan suggests, and I really would like to see the subcommittees come to grips with each of these questions with the staff and we come up with some drafts that the Commission would see and then we can go beyond that where you will not have to have the full Commission's approval to prepare something, but I think the full Commission ought to have one opportunity to discuss these basic issues before we start talking with any of the witnesses again or new witnesses that we might bring in.

MR. LACY: I would agree.

MR. LEVINE: Would or would not?

MR. LACY: Would.

MR. LEVINE: You are not suggesting that we just not have any witnesses in October? That is not what you mean?

MR. WEDGEWORTH: No.

MR. LEVINE: No witnesses on the specific --

MR. WEDGEWORTH: No witnesses on the specific drafts that we may have come up.

MR. LACY: What I would be hoping at the October meeting, that is a two-day meeting, and perhaps one day could be confined on the -- well, one day or a good part of the day could be reserved for sufficient discussion on these computer issues to let us begin moving forward on it. Or else maybe devote the whole -- I have a feeling we can easily find ourselves pushed into a closing date without having materially considered the thing and I suspect there is going to be a lot of revision and changing back and forth in terms of comments that we get. It is just very hard to get focused comments from people unless you give them something to comment on, so I think the sooner we begin our own discussions in terms of some specific drafts of reports, the better.

MR. LEVINE: Okay. I would just hope that the discussions would revolve around the ideas in the drafts rather than the language, because I think we all recognize the committee, as a whole, is drafting --

MR. LACY: Those satisfied with the approaches might be willing to delegate to the subcommittees and to the staff specific drafting problems. Particularly, since we are stuck at the stage of sending out comments.

MR. LEVINE: If I can just report one or two other things: One is that we have hired a policy analyst who Ms. Karpatkin knows who will begin work in about two weeks. Mike and I had discussed with the George Washington University School of Policy Analysis and Scientific Technology Studies and they wrote up a proposal for us, which the planning committee has seen. They would propose doing something for $100,000. I think the proposal really does not make much sense and I do not think it will be necessary to go ahead with that, with the policy analyst on staff.

JUDGE FULD: It would be a mistake to go ahead with it.

MR. LEVINE: I think so, too. The Judge has seen it and Mel has seen it and I think Dee has read it. Bob has not had a chance to carefully look it over, but it is essentially --

MR. NIMMER: It is a marvelous example of jargon.

MR. LACY: I had a feeling by changing a very few words it could have been a proposal to do a policy analysis of reorganizing the sewage system of Santa Monica.

MR. NIMMER: And probably was.

MR. LACY: Or anything else. They were going to consult all the experts and do all this and I also have the feeling that they would spend most of their time consulting with us and I do not think any of us have time to sit down and listen to people for $100,000 worth of their time.

MR. WEDGEWORTH: Are we going to get a budget statement following the close of the fiscal year for the Commission?

MS. DOUGHERTY: We can.

MR. LEVINE: I assume so, if you would like one.

MR. WEDGEWORTH: I think it would be useful.

MR. LEVINE: To see how the money is spent.

JUDGE FULD: Some of it is in the report that you drafted, isn't it?

MR. LEVINE: Yes. But that is only proposed. That is proposed budget; that is not money that is spent.

MS. DOUGHERTY: It generally takes two or three weeks after the close of the year to get a budget run off.

MR. WEDGEWORTH: I just wanted to be sure we were scheduled to have some kind of report.

MR. LACY: Arthur, at the risk of being repetitious, are we leaving it that it is the hope at least that the several subcommittees will get material into you before the October meeting on their respective areas in the computer field that would permit discussion at the October meeting?

MR. LEVINE: That is fine.

MS. WILCOX: Do you have a copy, Arthur, of the cover letter?

MR. LEVINE: That is just what is being placed in front of you.

MR. HERSEY: Could you have clean copies of the agreed guidelines as soon as possible?

MR. LEVINE: Yes. It will be Monday before we can do it.

MR. LACY: Is this going to be sent out as a mailogram or Telex? Congress may have adjourned before everybody --

MR. LEVINE: No. We cannot do that. My assumption was, I guess correctly, that perhaps Alice, you, and John would just have to orally read it over the phone to people. Unless you have --

MR. LACY: I have not got anything to read over the phone.

MR. LEVINE: Okay.

MR. HERSEY: I can get it to Irwin; Lieb can get it from him.

MR. LACY: You were saying you wanted a clean copy. I think I could reconstruct it maybe, although I did not take as careful notes as you did, but I would be very grateful for a really clean one.

JUDGE FULD: Bob?

MR. WEDGEWORTH: Before we break up, for the record, I would just like to thank Mel Nimmer for the arrangements that he made for this meeting. I think it has not only been a productive one, but it has also been a very pleasant setting.

JUDGE FULD: We all join in that.

MR. NIMMER: Accommodations to which all of the parties have subscribed.

MR. LEVINE: In the last sentence of the first paragraph, I changed it from "compromise" to "accommodation to which all of the parties can subscribe to."

(The meeting adjourned at 4:15 P.M.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, Susan M. Herington, CSR 3088, a Notary Public in and for the State of California, do hereby certify:

That the foregoing transcript was recorded stenographically by me at the time and place herein named, and was thereafter reduced to typewriting under my direction and supervision;

That the foregoing comprises a true and correct copy of the proceedings had and reported by me.

I hereby certify that I am not interested in the event of the action.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal this 28 day of September, 1976

Susan M Herington
NOTARY PUBLIC IN AND FOR THE
STATE OF CALIFORNIA

Commission Expires Oct. 21, 1979